(1)

Supreme Court, U.S.
FILED

NO. 93 1469 MAR 18 1994

IN THE
UNITED STATES SUPREME COURT OF THE CLERK
OCTOBER 1993 TERM

FOXWOOD MANAGEMENT COMPANY,
CHARLES L. SOWELL and JACK C. OGG

Defendants/Applicants/
Petitioners

V.

THE FEDERAL DEPOSIT INSURANCE
CORPORATION, AS RECEIVER FOR
GIBRALTAR SAVINGS ASSOCIATION and
FIRST GIBRALTAR BANK, FSB

Plaintiff/Respondents

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

G. RILEY HETHERINGTON
1254 FM 1463 Road
Katy, Texas 77494
(713) 395-2600
(713) 395-4488
Texas Bar No. 09554500
Fed. I.D. #6015
COUNSEL OF RECORD FOR
JACK C. OGG, FOXWOOD
MANAGEMENT COMPANY and
CHARLES L. SOWELL

109 pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in failing to find that lack of the required ten day notice to Applicants of Plaintiff's Motion for Summary Judgment constituted a violation of the procedural due process clause of the Constitution of the United States of America?

2. Did the Court of Appeals err in finding that no notice under Rule 56 of the Federal Rules of Civil Procedure to Applicants of Plaintiff's Motion for Summary Judgment, constituted harmless error?

3. Did the Court of Appeals err in failing to find that Plaintiff's failure to prove that a foreclosure sale was commercially reasonable as required by holdings of the Texas Supreme Court, prevented summary judgment?

4. Did the Court of Appeals err in failing to find that Plaintiff failed to

prove every element necessary in its claim based on breach of promissory note and guaranty so that there was no genuine issue of material fact under Rule 56 of the Federal Rules of Civil Procedure?

LIST OF INTERESTED PERSONS

The undersigned counsel certifies that the following listed persons have an interest in the outcome of this case.

Applicant/Defendant: Jack C. Ogg

Present Counsel for Applicant:

Jack C. Ogg
Jack C. Ogg & Associates
2700 Post Oak Blvd., Suite 1770
Houston, Texas 77056

Applicant/Defendant: Foxwood Management Company

Present Counsel for Applicant:

Jack C. Ogg
Jack C. Ogg & Associates
2700 Post Oak Blvd., Suite 1770
Houston, Texas 77056

Applicant/Defendant: Charles L. Sowell

Present Counsel for Appellant:

Michael L. Landrum
820 N. Gessner, Suite 1380
Houston, Texas 77024

Defendant: Patrick L. Mahaffey

Mr. Patrick L. Mahaffey, Pro Se
1212 Gray Moss
Houston, Texas 77055

Appellee/Plaintiff: Federal Deposit Insurance Corporation, as Receiver for Gibraltar Savings Association

Present Counsel for Appellee:

Mr. Michael B. Lee
Ms. Rachel A. Fefer
Fouts & Moore
5555 San Felipe, 17th Floor
Houston, Texas 77056

and/or

Mr. Geoffrey Bracken
Sewell & Riggs, P.C.
333 Clay Avenue, Suite 800
Houston, Texas 77002

Appellee/Plaintiff: First Gibraltar Bank FSB

Present Counsel for Appellee:

Mr. Richard B. Sanders
Bracewell & Patterson
2900 South Tower Pennzoil Place
Houston, Texas 77002-2781

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW.....i

LIST OF INTERESTED PERSONS.....iii

TABLE OF AUTHORITIES.....vii

OPINIONS.....1

JURISDICTIONAL GROUNDS.....1

CONSTITUTION AND STATUTES.....3

STATEMENT OF THE CASE.....3

COURSE OF PROCEEDINGS AND DISPOSITION IN COURT OF APPEALS.....3

COURSE OF PROCEEDINGS AND DISPOSITION IN DISTRICT COURT.....5

FEDERAL JURISDICTION.....11

ARGUMENT AND AUTHORITIES:

POINT NUMBER ONE.....12

1. DID THE COURT OF APPEALS ERR IN FAILING TO FIND THAT LACK OF THE REQUIRED TEN DAY NOTICE TO APPLICANTS OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT CONSTITUTED A VIOLATION OF THE PROCEDURAL DUE PROCESS CLAUSE OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA?

POINT NUMBER TWO.....16

2. DID THE COURT OF APPEALS ERR IN FINDING THAT NO NOTICE UNDER RULE 56 OF THE FEDERAL

RULES OF CIVIL PROCEDURE TO APPLICANTS OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, CONSTITUTING HARMLESS ERROR?

POINT NUMBER THREE.....26

3. DID THE COURT OF APPEALS ERR IN FAILING TO FIND THAT PLAINTIFF'S FAILURE TO PROVE THAT A FORECLOSURE SALE WAS COMMERCIALLY REASONABLE AS REQUIRED BY HOLDINGS OF THE TEXAS SUPREME COURT, PREVENTED SUMMARY JUDGMENT?

POINT NUMBER FOUR.....34

4. DID THE COURT OF APPEALS ERR IN FAILING TO FIND THAT PLAINTIFF FAILED TO PROVE EVERY ELEMENT NECESSARY IN ITS CLAIM BASED ON BREACH OF PROMISSORY NOTE AND GUARANTY SO THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT UNDER RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE?

CONCLUSION.....45

CERTIFICATE OF SERVICE.....47

APPENDIX TABLE OF CONTENTS.....48

TABLE OF AUTHORITIES

CASES **PAGE**

American Amicable Life Insurance Co. v. Jay's Air Conditioning & Heating, Inc., 535 S.W.2d 23, 25 (Tex.Civ.App.-Waco, 1976, writ ref'd, n.r.e.).....32

Benton-Volvo-Metairie, Inc. v. Volvo Southwest, Inc., 479 F.2d 135 (5th Cir. 1973).....44

Bridges v. Internal Revenue Service, 433 F.2d 299 (5th Cir. 1970).....44

Chavers v. Exxon Corp., 716 F.2d 315 (5th Cir. 1983).....44

Colony Creek, Ltd. v. RTC, 941 F.2d 1323 (5th Cir. 1991).....43

Continental National Bank of Fort Worth v. Connor, 214 S.W.2d 928 (Tex.1948).....38

Dawkins v. Green, 412 F.2d 644 (5th Cir. 1969).....44

Eguia v. Tompkins, 756 F.2d 1130 (1985).....14

FDIC v. Texas Country Living, Inc. v. Bluebonnet Savings Bank FSB, 756 F.Supp.984 (Lufkin, Texas 1990).....22

First Continental Real Estate Investment Trust v. Continental Steel Co., 569 S.W.2d 42 (Tex.Civ.App.-Ft. Worth, 1978, no writ)...33

First National Bank v. Whirlpool Corp., 517 S.W.2d 262, 266 (Tex.1974).....32

Fowler v. Southwestern Bell Telephone & Telegraph, 343 F.2d 150 (5th Cir. 1965).....44

Galindo v. Precision American Corp., 754 F.2d 1212 (5th Cir. 1985).....44

Gossett v. Du-Ra-Kel Corp., 569 F.2d 869 (5th Cir. 1978).....44

Greathouse v. Charter National Bank Southwest, 851 S.W.2d 173 (Tex. 1992).....2,27,29,34

Griffin Oil Co., Debtor, 149 B.R. 419 (E.D. Texas 1992).....13

Houk Air Conditioning, Inc. v. Mortgage & Trust, Inc., 517 S.W.2d 593, 595 (Tex.Civ.App. -Waco, 1974, no writ).....32

Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).....13

Mullane v. Central Hanover Trust Co., 339 U.S. 306 70 S.Ct. 652 941 Ed. 865 (1950).....13

National Expositions, Inc. v. Crowley Maritime Corp., 824 F.2d 131 (1st Cir. 1987).....20

Nimon v. RTC, 975 F.2d 240 (5th Cir. 1992).....14

Pitts v. Shell Oil Company, 463 F.2d 331 (5th Cir. 1972).....44

Powell v. United States, 849 F.2d 1576 (5th Cir. 1988).....17,18,19,20

Richard H. Sikes, Inc. v. L & N Consultants, Inc., 586 S.W.2d 950 (Tex.Civ.App.-Waco, 1979, writ ref'd, n.r.e.).....33

Rogers v. NCNB Texas National Bank, No. 05-91-0094-CV Slip Opinion at 22-23 (Tex.App. Dallas, Feb. 19, 1992, no writ).....36

RTC v. Camp, 965 F.2d 25 (5th Cir. 1992).....43

Tenenbaum v. Economics Laboratory, Inc., 628 S.W.2d 769 (Tex.1982).....28

Topalian v. Ehrman case, 954 F.2d 1125 (5th Cir. 1992).....43

Triland Holdings & Company v. Sunbelt Service Corp., 884 F.2d 205 (5th Cir.1989).....21,22

U.S. v. James Daniel Good Real Property, 62 USLW 4013 (12-14-93).....13

United States Development Corp. v. Peoples Federal Savings & Loan Association, 873 F.2d 731, 735 (4th Cir. 1989).....17,20

Windbourne v. Eastern Airlines, Inc., 632 F.2d 219 (2nd Cir. 1980).....17

Wolf v. Little John Corporation of Liberia, 585 S.W.2d 774 (Tex.App. Houston [1st Dist.] 1979, no writ).....40

Ya Shon v. Gregory, 737 F.2d 547 (6th Cir. 1984) cert denied, 108 S.Ct. 2015, 100 L.Ed. 602 (1988).....20

CONSTITUTION STATUTES AND RULES PAGE

12 U.S.C. Sect. 1730(k)(1).....12

Administrative Procedure Act,
5 U.S.C. Sec. 702-706.....24

12 U.S.C. Sec. 1464, et seq.....24

Constitution Articles 5 and 14
of the United States Constitution.....3,14

28 U.S.C. 1441.....12

28 U.S.C. Sect. 1254.....1

Federal Rule of Civil Procedure
56(c).....3,4,14,16,17,20

Texas Business and Commerce Code
Sect. 9.504(c).....3,28,32,34

Tex. Bus. and Commerce Code,
Sec. 3.403.....40

Texas Deceptive Trade Practices
and Consumer Protection Act.....6,7

OPINIONS

The opinion of the Fifth Circuit Court of Appeals rendered in this cause on January 14, 1994, is included in the Appendix. Section A, pp. 1-31. There was no formal opinion of the District Court rendered in this cause, except the Order dated April 14, 1992, (App. C, pp. 1-5), Judgment dated April 28, 1992 (App. D, pp. 1-3), and Order dated February 22, 1991 (App. B, pp. 1-4).

JURISDICTIONAL GROUNDS

The Fifth Circuit Court of Appeals entered judgment in this cause for which an appeal was taken on January 14, 1994; a rehearing of such judgment was denied by the Court of Appeals on February 9, 1994; and the Supreme Court has jurisdiction to review the Judgment by the Court of Appeals under the provisions of **28 U.S.C. Sect. 1254.**

There are special reasons for granting Writ of Certiorari in this case, including, but not limited to, the following:

1. The Court of Appeals has rendered a decision in conflict with the decision of another Federal Court of Appeals on the same matters; namely, that no notice under Rule 56 of the Federal Rules of Civil Procedure to Applicant of Plaintiff's Motion for Summary Judgment was required; or that no notice constituted "harmless error" and that all elements of Plaintiff's Motion for Summary Judgment had been adequately demonstrated; and

2. The highest court of the state of Texas has decided a question requiring the elements of necessity and proof in connection with a Federal Motion for Summary Judgment which was not required by the Court of Appeals in this case. See, **Greathouse v. Charter National Bank Southwest**, 851 S.W.2d 173 (Tex. 1992); and

3. The Constitution of the United States requires procedural due process by giving notice of a Motion for Summary

Judgment which was not followed by the Court of Appeals in the present case.

CONSTITUTION AND STATUTES

The following **Constitution Articles 5 and 14** of the United States Constitution, **Federal Rule of Civil Procedure 56(c)** and **Texas Business and Commerce Code Sect. 9.504(c)** are the applicable Constitution and Statutes involved in the present controversy. The full text of such are included in the Appendix hereto. (App. F, pp. 1-4).

STATEMENT OF THE CASE

Course of Proceedings and Disposition in Court of Appeals

The Fifth Circuit Court of Appeals affirmed a judgment of the District Court permitting summary judgment in favor of Plaintiff, FDIC as receiver for Gibraltar Savings, against applicants even though such Plaintiff failed to give ten days notice of a hearing of its Motion for Summary Judgment, as required under the provisions of **Rule**

56(c) of the Federal Rules of Civil Procedure. The Court of Appeals' decision further affirmed a Motion for Summary Judgment granted in favor of First Gibraltar FSB on its claim that applicant's defaulted in connection with the promissory note, even though the essential elements of the cause of action, including commercial reasonable disposition after foreclosure, as required under state law, were not properly plead, presented or proved, in any way, to enable First Gibraltar FSB to be entitled to a summary judgment.

In reaching its decision, the Court of Appeals specifically noted that FDIC as receiver for Gibraltar Savings, had failed to give the required ten days notice under **Rule 56**, but that such failure was "harmless error". The Court of Appeals further ignored the requirement of the Texas Supreme Court that disposition of collateral after foreclosure and a pursuit of a deficiency

must occur only after a sale of the collateral in a "commercially reasonable manner". The court further ignored the requirements of the Federal Summary Judgment rule as articulated by other circuits requiring that all elements of the cause of action be proved by adequate summary judgment proof.

For a clear understanding of the Court of Appeals review of the procedural points involved, the following is a summary of the course of the proceedings in the District Court case upon which the Court of Appeals relied.

Course of Proceedings and Disposition in District Court

This case was commenced by Gibraltar Savings Association ("Gibraltar Savings") in the 80th Judicial District Court of Harris County, Texas, against Foxwood Management Company, Thomas G. Sumner, Charles L. Sowell, Jack C. Ogg and Patrick L. Mahaffey in Cause Number 87-11601 styled "Gibraltar Savings

Association vs. Foxwood Management Company, Thomas G. Sumner, Charles L. Sowell, Jack C. Ogg and Patrick L. Mahaffey" (hereinafter "the State Court action"). Foxwood Management Company, Thomas G. Sumner, Jack C. Ogg, Patrick L. Mahaffey, sought by counter-claim in the State court action (the original counter-claim of which was not included in the pleadings removed to Federal Court hereinafter defined) to recover from Gibraltar Savings damages for it's breach of contract, breach of the duty of good faith and fair dealing, breach of fiduciary duties, fraud, violations of the **Texas Deceptive Trade Practices and Consumer Protection Act**, and asserting various affirmative defenses. Defendant, Charles Sowell sought to recover from Gibraltar Savings in the State Court action, damages including Gibraltar Savings breach of agreement, breach of the duty of good faith and fair dealing, violations of the **Texas Deceptive Trade Practices and**

Consumer Protection Act, wrongful foreclosure and various affirmative defenses.

On January 25, 1989, Federal Savings and Loan Insurance Corporation ("FSLIC") in it's capacity as Receiver for Gibraltar Savings, removed the case to Federal Court. On May 22, 1989, the FSLIC filed a Motion to Dismiss the counter-claims of all listed Defendants. On November 14, 1989, the District Court denied FSLIC's Motion to Dismiss. On December 12, 1989, Thomas G. Sumner filed a Suggestion of Bankruptcy under Chapter 7 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Texas, Houston Division, under Cause No. 89-08776-H3-7. Thereafter, the Federal Deposit Insurance Corporation ("FDIC") gave notice of it's proper designation from that previously indicated. On October 31, 1990, the FDIC filed a Motion for Severance as to it's cause of action against Thomas G. Sumner only.

On November 29, 1990, First Gibraltar Bank FSB ("First Gibraltar") filed a Motion for Intervention to assert it's rights as to assets acquired by First Gibraltar from Gibraltar Savings asserting cause of action against Foxwood Management Company, Thomas G. Sumner, Charles L. Sowell, Jack C. Ogg, and Patrick L. Mahaffey in such capacity. On December 18, 1990, the District Court signed an order allowing such intervention. On December 27, 1990, First Gibraltar filed it's complaint in intervention seeking recovery on a Promissory Note executed by Foxwood Properties, Ltd. No. 1 to Gibraltar Savings. The complaint did not seek recovery in connection with any guaranties executed by Thomas G. Sumner, Charles L. Sowell, Jack C. Ogg and Patrick L. Mahaffey.

On December 21, 1990, the District Court granted the FDIC's Motion for Severance as to Thomas G. Sumner.

On January 31, 1991, Federal Deposit Insurance Corporation, as Receiver for Gibraltar Savings Association filed without notice of any kind its Motion for Summary Judgment on January 31, 1991. The Motion for Summary Judgment consisted of 48 pages, the motion itself, and an additional 96 pages of exhibits. The Motion for Summary Judgment was signed by Michael B. Lee of Fouts & Moore, Attorneys at Law, as attorneys for the Federal Deposit Insurance Corporation. A certificate of service was signed by James H. Hada (presumably with Mr. Lee's law firm) stating that true and correct copy of the Motion for Summary Judgment had been sent to the following listed individuals: Joe C. Holzer, Butler & Binion, 1600 Allied Bank Plaza, Houston, Texas 77002 and Michael L. Landrum, One Riverway, Suite 1320, Houston, Texas 77056, by certified mail. The Motion for Summary Judgment of the FDIC, as Receiver of Gibraltar Savings Association was not sent

to Jack C. Ogg, Pro Se, 5847 San Felipe, Suite 3200, Houston, Texas 77057, Charles Wist, Wist, Boyd & Holland, 11111 Katy Freeway, Suite 570, Houston, Texas 77079, and/or Patrick L. Mahaffey, Pro Se, 11757 Katy Freeway, Suite 1090, Houston, Texas 77079.

On February 22, 1991, Judge David Hitner, the United States District Judge, signed an Order granting Federal Deposit Insurance Corporation's Motion for Summary Judgment. The Order was entered on February 22, 1991 (App. B, pp. 1-4). No judgment was ever signed by Judge Hitner in connection with the Order granting Motion for Summary Judgment.

On February 28, 1992, First Gibraltar filed a Motion for Summary Judgment against Foxwood Management Company, Thomas G. Sumner, Charles L. Sowell, Jack C. Ogg, Patrick L. Mahaffey, claiming that it was entitled to summary judgment for recovery of all

deficiencies existing after foreclosure in connection with the Gibraltar Savings' Promissory Note. On April 14, 1992, the District Court ordered that the Motion for Summary Judgment filed by First Gibraltar be granted. (App. C, pp. 1-5). On April 28, 1992, the District Court signed a judgment in favor of First Gibraltar against Foxwood Management Company, Foxwood Properties, Ltd. #1 (not a party to any litigation at any level herein), Charles Sowell, Jack Ogg, and Patrick Mahaffey in the principal amount of $1,534.532.45, interest thereon in the amount of $1,329.620.26, with per diem interest from April 28, 1992 forward in the amount of $756.75, attorney's fees in the amount of ten percent (10%) of the outstanding principal and interest awarded, and post-judgment interest at the rate of 4.55%.

Federal Jurisdiction

Federal jurisdiction was invoked in the Federal District Court by the FSLIC under 12

U.S.C. Sect. 1730(k)(1) as an agency of the United States and under removal provision 28 U.S.C. 1441.

ARGUMENT AND AUTHORITIES

Applicants, Foxwood Management Company, Charles L. Sowell and Jack C. Ogg, would show that a Writ of Certiorari should issue for one or more of the following reasons:

POINT NUMBER ONE

1. Did the Court of Appeals err in failing to find that lack of the required ten day notice to Applicants of Plaintiff's Motion for Summary Judgment constituted a violation of the procedural due process clause of the Constitution of the United States of America? (RESTATED)

The Supreme Court, in an off-quoted phrase, has held that:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality if notice reasonably calculated under all circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to

> present their objections. The notice must be of such nature as reasonably to convey the required information and it must provide a reasonable time for those interested to respond."

See, **Mullane v. Central Hanover Trust Co.**, 339 U.S. 306 70 S.Ct. 652 941 Ed. 865 (1950); See also, **Griffin Oil Co., Debtor**, 149 B.R. 419 (E.D. Texas 1992). See also, **U.S. v. James Daniel Good Real Property**, 62 USLW 4013 (12-14-93).

This Court has consistently reviewed procedural due process claims by use of a three prong review as set out in **Mathews v. Eldridge**, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); that test is as follows: (1) the private interests that will be effected by the agency's action; (2) the risk of erroneous deprivation due to the procedures used and the reduction by substitute on additional procedures; and (3) the interests of the government, including the burden that would be imposed by additional or substitute procedures. See

also, Nimon v. RTC, 975 F.2d 240 (5th Cir. 1992); Eguia v. Tompkins, 756 F.2d 1130 (1985). **U.S. Constitution Amendments 5 and 14.**

Applying the procedural due process criteria and express ten day notice provisions of **Federal Rule of Civil Procedure 56**, Applicants were clearly deprived of Constitutional due process in this case by the lack of notice or opportunity to respond. As the Court noted, a sum in excess of 2.5 million dollars with continuing interest is at stake. The Applicants' private interests were clearly at risk. Applicants were not offered any opportunity to contest administratively, or to explain the propriety of, the FHLLB's determination of solvency at the trial court level, which could not be cured by this Court's review of the facts. The risk of utilizing such a harmless error by the Fifth Circuit Court of Appeals analysis outweighed its benefits. No

additional burden to the Appellee FDIC would exist if the case were remanded. Applicants have adequately demonstrated - and this Court should, after appropriate review, conclude - a lack of procedural due process.

The absence of notice in the present case (under Rule 56 of the Federal Rules of Civil Procedure) constitutes a violation of the procedural due process clause of the Constitution and applicable progeny under that constitutional article. The United States Supreme Court, in speaking to the opportunity to be heard and notice requirements in connection with procedural rules, confirms that such notice, and reasonable time to respond, including rules in support thereof, are at the very heart of the procedural due process clause of the Constitution. The failure on the part of the FDIC to give appropriate notice to Applicants, when, in fact, the attorneys for the FDIC were well aware of the significance

and finality of their action, are, as the Fifth Circuit Court of Appeals points out, a source of error on the part of the District Court, and there was no "excuse for the FDIC's failure to serve," but also a violation of the due process clause. (App. A, pp. 11).

POINT NUMBER TWO

2. Did the Court of Appeals err in finding that no notice under Rule 56 of the Federal Rules of Civil Procedure to Applicants of Plaintiff's Motion for Summary Judgment, constituted harmless error? (RESTATED).

The Fifth Circuit Court's finding that although no notice of the Motion for Summary Judgment was given by FDIC receiver for Gibraltar Savings Association to Applicants under **Federal Rule of Civil Procedure 56(c)** such error was harmless is in direct conflict with other circuit court decisions. Other circuit courts have consistently upheld the

propriety of the notice requirements of **Rule 56**, stating that under no circumstances can the lack of notice be considered harmless. See, **United States Development Corp. v. Peoples Federal Savings and Loan Association**, 873 F.2d 731, 735 (4th Cir. 1989); and **Windbourne v. Eastern Airlines, Inc.**, 632 F.2d 219 (2nd Cir. 1980) where the Second Circuit in salient part stated as follows:

> As numerous courts have recognized the purpose of the advance notice provision in Rule 56(c) is to permit the nonmoving party a reasonable opportunity to challenge the motion ... the only curative measure, in order to comply with the procedural provisions of Rule 56(c) available to remedy the initial due process would be an order vacating those judgments ...

The Fifth Circuit Court of Appeals correctly stated the requirement to give ten days notice under **Rule 56 of the Texas Rules of Civil Procedure** as articulated in **Powell v. United States**, 849 F.2d 1576 (5th Cir. 1988), but, unfortunately, did not properly

apply the provisions of the **Powell** case to the present factual circumstances.

The Court in **Powell v. United States**, stated the salient notice rule as follows:

> "It appears clear that error in notice is harmless if the non-moving party admits that he has no additional evidence anyway, or if, as in **Norman v. McCotter**, the Appellate court evaluates all of the non-moving parties additional evidence and finds no genuine issue of fact."

The facts of the present case are remarkably similar to the problems encountered in the **Powell** case by the Applicant in that matter. In fact, the attorney for the Applicants in **Powell** found out only a very few hours before the Court's ruling that, in fact, the Court would consider the entry of a summary judgment. In the present factual situation, no notice was ever received by the Applicants that the Motion for Summary Judgment had been filed or would be considered by the Court. The **Powell** court specifically indicated that the non-moving party in that case had not

admitted that no additional evidence existed to respond to the claim and, unlike **Norman v. McCotter**, the Appellate Court had no additional evidence before it to review. The **Powell** court indicated that genuine issues of material facts existed and, therefore, reversed the summary judgment. Similarly, the Fifth Circuit Court acknowledges that the FHLBB's insolvency determination can be challenged under the Administrative Procedure Act. Whether and to what extent Applicants were foreclosed from making such a direct attack, including the evidence that would have been presented in connection with such preclusion, was clearly pointed out in Applicant's Brief. The prudential mootness argument mentioned in the Fifth Circuit Court's opinion does not overcome or alter that Court's position as articulated in **Powell** that the non-moving party "had no opportunity to submit summary judgment evidence to support his contention." **Powell**

v. United States, 849 F.2d 1576, 1582 (5th Cir. 1988).

Other circuits that have reviewed and followed the **Powell v. United States** decision have indicated that the required notice under **Rule 56** "must be sufficient to provide the losing party with an adequate opportunity to demonstrate a genuine issue of material fact" and that "no notice is clearly not sufficient notice." See, **United States Development Corp. v. Peoples Federal Savings and Loan Association**, 873 F.2d 731, 735 (4th Cir. 1989). See, **National Expositions, Inc. v. Crowley Maritime Corp.**, 824 F.2d 131 (1st Cir. 1987). **Ya Shon v. Gregory**, 737 F.2d 547 (6th Cir. 1984) cert denied, 108 S.Ct. 2015, 100 L.Ed. 602 (1988). As the Fifth Circuit Court noted, Applicants were not afforded any such notice. (App. A, pp. 11-12).

Even assuming that a "harmless error" rule might apply in a lack of **Federal Rule of Civil Procedure 56** notice case, (an

assumption expressly rejected by Applicant herein) the effect of failure to give such notice in the present case was clearly harmful, requiring reversal.

The Federal Deposit Insurance Corporation, as receiver, had previously filed a Motion to Dismiss the counter-claims of counter-plaintiffs, Foxwood Management Company, Thomas G. Sumner, Charles L. Sowell, Jack C. Ogg and Patrick L. Mahaffey. That motion was filed on May 22, 1989. The main thrust of such motion was that the insolvency of Gibraltar Savings Association, created a circumstance where most, if not all, of counter-plaintiff's/applicant's claims were moot as a matter of law. On November 14, 1989, the District Court entered an Order signed on November 9, 1989, disallowing the Motion to Dismiss confirming the propriety of such action under Fifth Circuit's decision in the case of **Triland Holdings & Company v. Sunbelt Service Corp.**, 884 F.2d 205 (5th

Cir.1989). The District Court correctly reasoned that the counter-claim asserted by the Applicants might still equal or be greater than the amount claimed to be due in connection with the promissory note deficiency claim of Gibraltar Savings Association. However, after the Motion for Summary Judgment of the Federal Deposit Insurance Corporation, as receiver for Gibraltar Savings was filed on January 31, 1991, the District Court granted such Summary Judgment on the sole basis of mootness arguments raised in the Federal Deposit Insurance Corporation's Motion. (App. B, pp. 1-4).

The Court, in the case of **FDIC v. Texas Country Living, Inc. v. Bluebonnet Savings Bank FSB**, 756 F.Supp.984 (Lufkin, Texas 1990), analyzing the mootness argument of **Triland Holdings & Company v. Sunbelt Service Corp.** case, supra., declined to allow

mootness to be the sole reason for dismissal and stated the following:

> "But another reason is that if the standards, the trial and court articulated are met, if there never will be any assets to satisfy judgment, no reason exists why the FDIC-Receiver should not simply accept a default judgment against itself rather than demand judgment in its favor on the ground of mootness. The only affect of such a Default Judgment would be that FDIC-Receiver would add another person to the list of HSA creditors who will not collect a penny on their claims. Obviously, to dismiss the claims against the FDIC on the mootness theory urged here results in the short circuiting of the system whereby claims determined on their merits. If FDIC is convinced that such a result is harmless under the present circumstances, it should accept the risks that it's forecast will prove incorrect, rather than placing the risk on those with claims against it. Certainly, for the FDIC to accept a default judgment on such claims would be quicker and cheaper and seeking to obtain summary judgment based on the mootness theory presented here.
>
> D'Oench, Duhme and it's progeny already provide the FDIC with an extraordinary arsenal to overcome defenses against the enforcement of obligations to the FDIC and to defeat on the merits claims against it. No matter how dire the

> circumstances in which FDIC finds itself, little need exists to give it another magic weapon with which to conquer all those. To do so by acceding to the mootness theory may ease the FDIC's heavy burden, but at the same time, would create bad law."

By its granting of the FDIC's Motion for Summary Judgment without notice to all affected parties, the District Court, in effect, unconstitutionally terminated the ability of Applicants, Jack C. Ogg and Foxwood Management Company to contest under any applicable theory, including, but not limited to, the provisions of the **Administrative Procedure Act, 5 U.S.C. Sec. 702-706**, the propriety or determination by the Federal Home Loan Bank Board of insolvency on the part of Gibraltar Savings Association. By, the time that applicants would have received notice of the "finality" of the bank board's order the appropriate time period had most probably expired to object to the findings of such board. See, **12 U.S.C. Sec. 1464**, et seq. (30 days to

bring action against bank board after appointment of receiver for failed thrift institution). Claims to object to the appointment of such a receiver, for instance, are limited to objection only by the affected association (a position that defendants do not hold in this case). In it's Motion for Summary Judgment, the FDIC asserted that the Bank Board Resolution Number 88-1408P, signed December 27, 1988, purportedly confirmed that unsecured creditors were "at best urging a worthless disputed claim", whereas in the preceding paragraph, the FDIC offered a monthly report of financial condition which was dated almost a year later, November 30, 1989. By it's own proof, FDIC demonstrated that the liability-asset position of the failed Gibraltar Savings could change at any time, depending upon the status of secured and depositor claims, dealt with in the continuing claim process. Therefore, it was possible that assets could have existed in

connection with Gibraltar Savings, after the conclusion of such determinations, which would not have rendered the claims of counter-plaintiffs moot. The continuing change in the financial condition of Gibraltar Savings vis-a-vis the claim process, including re-distribution of claims among and between depositors, secured creditors and unsecured creditors, is dynamic and, by the movant's own proof, can change at any time. To preempt such determination based on a "one time statement" of worthlessness would, therefore, be premature and should not render any such claims moot.

POINT NUMBER THREE

3. Did the Court of Appeals err in failing to find that Plaintiff's failure to prove that a foreclosure sale was commercially reasonable as required by holdings of the Texas Supreme Court, prevented summary judgment? (RESTATED)

The Texas Supreme Court has ruled in the case of **Greathouse v. Charter National Bank Southwest**, 851 S.W.2d 173 (Tex. 1992) that when a creditor seeks recovery of a deficiency after foreclosure against a Guarantor, an essential element which must be proven by adequate summary judgment proof is whether it's disposition under the terms of a Deed of Trust was "commercially reasonable". The moving party must both plead, prove and demonstrate such commercial reasonableness. The Texas Supreme Court in that case stated the applicable rule as follows:

> "A commercially reasonable disposition of collateral is in the nature of a condition to a creditor's recovery in a deficiency suit. We suggested this in Tenenbaum v. Economics Laboratory, Inc., 628 S.W.2d 769, 771 (Tex.1982) where we said, 'The only limits on the creditor's disposition of the collateral is that it must be commercially reasonable and must be made only after notification to the Debtor if required by Section 9.504. Then, and only then, is he entitled to sue for deficiency.' Evidence on the issue will ordinarily be more readily available to the creditor,

> *who takes the collateral and* arranges for it's disposition, than to the Debtor, who ordinarily plays no role in the disposition and is absent when it occurs. In general, it is easier for a creditor to prove that a disposition of collateral was commercially reasonable then for a Debtor to prove that it was not."

See also, **Tenenbaum v. Economics Laboratory, Inc.**, 628 S.W.2d 769 (Tex.1982). **Tex. Bus. & Comm. Code Sect. 9.504(c).** No where in First Gibraltar Bank, FSB's pleadings or it's Motion for Summary Judgment was the element of "commercially reasonable disposition of collateral" either asserted or properly demonstrated. No notice of intended foreclosure sale, acts incident to such sale, bids received, advertisements placed, or any other information relative to the commercial disposition process of the collateral were articulated, described, or otherwise offered.

In its opinion, rendered on January 14, 1994, the Fifth Circuit Court of Appeals held that First Gibraltar Bank FSB ("First Gibraltar") had proven every element

necessary to support its Summary Judgment against Applicants on a breach of promissory note so that there was no genuine issue as to any material fact.

Specifically, the Court of Appeals noted that a "sixth element" was alleged by Applicants requiring First Gibraltar to prove that dispositions of the collateral pledged, under the Deed of Trust, were commercially reasonable. The Court of Appeals went on to reason that "no evidence in the record below showed that Movants had foreclosed on any personal property" and, therefore, the provisions of the Texas Supreme Court decision in **Greathouse v. Charter National Bank Southwest**, 851 S.W.2d 173 (Tex.1992) did not apply. (App. A, pp. 28-29).

Applicants would show that the Fifth Circuit Court of Appeals has ignored the evidence attached to First Gibraltar's own Motion for Summary Judgment which clearly indicates that a foreclosure of personal

property had occurred. Specifically, the Affidavit of Donna Bailey, Vice President of First Gibraltar, indicated that "the lien created by the Deed of Trust was foreclosed and the property sold to the highest bidder."

The "Deed of Trust" attached to First Gibraltar's Motion as an integral part of the proof (according to the Fifth Circuit Court of Appeals, simply mislabeled) has the following salient provisions:

> "The parties hereto agree and grantors grant to said mortgagee a security interest in the consumer goods or equipment described herein. It is agreed that the security interest granted herein covers all air conditioning facilities or equipment, both heating and cooling, central or otherwise, lighting, plumbing fixtures, venetian blinds, draperies, wall to wall carpeting, hot water heaters, built in stoves, refrigerators, dishwashers, disposals, clothes dryers and washers, and all other built in appliances, whether similar or dissimilar, now or hereafter attached to or used in connection with the below described premises, as well as all betterments, in additions thereto;"

By the terms of the Deed of Trust, personal property was specifically pledged in favor of First Gibraltar.

The Deed of Trust goes on to provide in salient part as follows:

> "In addition to any other remedies granted in this agreement to the secured party or trustee, the secured party may, in the event of any default, proceed under the Uniform Commercial Code, as to all or any part of the personal property (tangible or intangible) and fixtures included in the properties described herein (such portion of the properties being herein referred to as "Collateral") and shall have and may exercise with respect to the Collateral all the rights, remedies, and powers the secured party under the Uniform Commercial Code including, without limitation, the right and power to sell, at public or private sale or sales, or otherwise dispose of, lease or utilize the Collateral in any part or parts thereof in any manner authorized or permitted under said Uniform Commercial Code after default by a debtor, and to apply the proceeds thereof toward payment of any reasonable costs and expenses and attorneys fees, legal expenses thereby incurred by secured party toward payment of debtor's obligations, including the note first above described."

By the terms of the Deed of Trust which was foreclosed upon by First Gibraltar, the personal property was to be sold at the public foreclosure sale.

Texas courts have long held that items such as those described in the Deed of Trust are removable personal property. As such, such personal property is subject to the **Uniform Commercial Code's Section 9.504(c)** requirement of commercially reasonable disposition at foreclosure. See, **First National Bank v. Whirlpool Corp.**, 517 S.W.2d 262, 266 (Tex.1974) garbage disposals and built in washers are removable personal property; **Houk Air Conditioning, Inc. v. Mortgage & Trust, Inc.**, 517 S.W.2d 593, 595 (Tex.Civ.App.-Waco, 1974, no writ) heating and air conditioning systems are removable personal property; **American Amicable Life Insurance Co. v. Jay's Air Conditioning & Heating, Inc.**, 535 S.W.2d 23, 25 (Tex.Civ.App.-Waco, 1976, writ ref'd, n.r.e.)

compressors and air handling units inside of air conditioning units are removable personal property; **First Continental Real Estate Investment Trust v. Continental Steel Co.**, 569 S.W.2d 42 (Tex.Civ.App.-Ft. Worth, 1978, no writ) windows and doors which could be removed by temporarily displacing brick and trim around them are removable personal property; **Richard H. Sikes, Inc. v. L & N Consultants, Inc.**, 586 S.W.2d 950 (Tex.Civ.App.-Waco, 1979, writ ref'd, n.r.e.) carpets, appliances, air conditioning and heating components, smoke detectors, burglar alarms, light fixtures, and door locks are removable personal property.

The Fifth Circuit Court of Appeals reliance on the fact that commercial reasonableness must only be proven in a personal property foreclosure setting, as opposed to a real property foreclosure setting, is therefore misplaced, and in contravention to the express requirements of

the highest court in the state of Texas. The evidence clearly indicated that a personal property foreclosure had occurred. First Gibraltar, in its pleadings and motion for summary judgment evidence, was required under the Greathouse v. Charter National Bank case and **Texas Business and Commerce Code Section 9.504(c)** to assert and properly demonstrate a commercially reasonable disposition of collateral. Nowhere did First Gibraltar meet this essential element of demonstrating an adequate deficiency to allow it to support any claim for damages by deficiency against Applicants after foreclosure of the personal property.

POINT NUMBER FOUR

4. Did the Court of Appeals err in failing to find that Plaintiff failed to prove every element necessary in its claim based on breach of promissory note and guaranty so that there was no genuine issue

of material fact under Rule 56 of the Federal Rules of Civil Procedure? (RESTATED).

First Gibraltar FSB, through an affidavit of Donna Bailey attached as Exhibit "E" to it's Motion for Summary Judgment, attempted to meet it's burden of proof and prove every essential element in it's cause of action based on a breach of promissory note executed by Foxwood Properties, Ltd. #1 and a guaranty, purportedly executed by Thomas Sumner, Charles Sowell, Jack Ogg and Patrick Mahaffey. In reviewing the affidavit, it appears that essential elements of its cause of action and ultimate issues of fact are not supported or in any way proven by the offered documentation in one or more of the following particulars:

The Affidavit indicates that Foxwood Properties, Ltd. executed a Deed of Trust, as specific real property in Harris County, in favor of Gibraltar Savings Association (and its successor First Gibraltar FSB), securing

payment of the note. Such Deed of Trust is purportedly attached as Exhibit "C" to the affidavit. In reviewing the attachments to Plaintiff's Motion for Summary Judgment, no Exhibit "C" is attached. There appear to be attached to such Motion for Summary Judgment an Exhibit "A", "B", "D", "E", "F" and "G", but no Exhibit "C". Therefore, no proof exists as to the existence of such secured property, whether all actions to enforce the terms of the promissory note and guaranty had been exercised in conjunction with the Deed of Trust, the correct amount of any deficiency, the amount owing after any foreclosure, or any facts related to the foreclosure. To what extent the First Gibraltar Savings FSB owned or possessed the Deed of Trust made the basis of the affidavit is also unanswered. See, **Rogers v. NCNB Texas National Bank**, No. 05-91-0094-CV Slip Opinion at 22-23 (Tex.App. Dallas, Feb. 19, 1992, no writ).

The Affidavit of Donna Bailey attached as Exhibit "E" also indicates that a promissory note is attached executed by Foxwood Properties, Ltd. #1 on March 30, 1981. In reviewing the note, attached as Exhibit "A" to First Gibraltar's Motion for Summary Judgment, the note specifically refers to a companion document as follows:

> The principal of this note represents funds presently owing to Payee evidenced by note executed by Makers; dated January 11, 1980, in the original principal sum of $2,330,000.00 (original note). This note represents a renewal extension and rearrangement of said original note according to the terms hereof.

The note purportedly dated January 11, 1980, from Foxwood Properties, Ltd. #1, to Gibraltar Savings Association is not attached, described or otherwise included in any proof offered by First Gibraltar FSB. The terms, conditions, maturity dates, interest rate, security for performance, ability to cure acceleration, notice or any other matters varying or contrary to the

provisions of the promissory note attached as Exhibit "A" to First Gibraltar FSB's Motion for Summary Judgment are, therefore, not before the court, unexplained, and create a "gap" in information provided as to potential liability of the named Defendants. The absence of such document not only make such note non negotiable, but also makes the obligations under the note attached as Exhibit "A" to its Motion for Summary Judgment burdened with or subject to other agreement. See, **Continental National Bank of Fort Worth v. Connor**, 214 S.W.2d 928 (Tex.1948). Therefore, the existence of the true and complete "note", the ownership/holder status in connection with such "note" and the amount due and owing, as well as default thereunder, are all issues unresolved, undescribed, unsupported, and outstanding in the absence of such document.

The affidavit of Donna Bailey, attached as Exhibit "E" to First Gibraltar FSB's

Motion for Summary Judgment also indicates that "Sumner, Sowell, Ogg, and Mahaffey defaulted on the note". The affidavit does not state whether the individual defendants, Sumner, Charles L. Sowell, Jack C. Ogg and Patrick Mahaffey, defaulted or failed to pay under the terms of any guaranty. The affidavit does not state who owed, including what entity or person either the purported note and/or the guaranty.

The promissory note attached as Exhibit "A" to First Gibraltar Bank's Motion for Summary Judgment, demonstrates that the true party maker in interest was "Foxwood Properties, Ltd. #1, a Texas limited partnership acting by and through its general partner, Foxwood Management Company, a General Partnership". Thomas G. Sumner, Charles L. Sowell, Jack C. Ogg, and Patrick L. Mahaffey signed only in their representative capacity as partners as did Foxwood Management Company on behalf of

Foxwood Properties, Ltd. #1. Signatures by Thomas G. Sumner, Charles L. Sowell, Jack C. Ogg and Patrick L. Mahaffey were therefore made in their representatives capacities only.

If signed in a representative capacity, Thomas G. Sumner, Charles L. Sowell, Jack C. Ogg and/or Patrick L. Mahaffey had no personal liability in connection with the promissory note. See, **Tex. Bus. and Commerce Code, Sec. 3.403.** The court in **Wolf v. Little John Corporation of Liberia**, 585 S.W.2d 774 (Tex.App.Houston [1st Dist.] 1979, no writ), stated the rule in Texas as to no personal liability in such event as follows:

> "Even though there is ambiguity or confusion as to the actual identity of the principal, if the note contains the name of an organization followed by the name of an authorized individual, plus his office, there is a prima facie showing that the individual signed in a representative capacity, and is thus not personally liable on the note."

Contrary to the express representations of the Affidavit of Donna Bailey, under the applicable Texas case law, Sumner, Sowell, Ogg and Mahaffey, as well as Foxwood Management Corp. did not "default on the note". Another essential element of First Gibraltar FSB's cause of action under the terms of the promissory note and guaranty agreement default was demonstrating that, in fact, a default occurred under the terms of the note. No where in the proof, allegations or documentation is this essential element met.

The affidavit of Donna Bailey, attached as Exhibit "E" to First Gibraltar FSB's Motion for Summary Judgment having failed to demonstrate essential elements to the cause of action asserted by First Gibraltar FSB, also fails for the reason that it contained conclusions of law and ultimate fact. The affidavit recites that the Defendants have "defaulted on the note" and that there is a

"deficiency" and that First Gibraltar is the "owner and holder of the note, the guaranty, and the Deed of Trust". The foregoing recitations reach ultimate conclusions of law and fact. This court has long held that "bald assertions of ultimate facts are ordinarily insufficient to support Summary Judgment, and cannot shift the burden of proof on a Motion for Summary Judgment to the non-movant."

In its opinion, the Fifth Circuit Court of Appeals held that Donna Bailey's Affidavit, as an officer of First Gibraltar, though conclusory, had and would support First Gibraltar's Motion for Summary Judgment. The Court indicated that such Affidavit met "a middle level of conclusoriness." (App. A, pp. 24).

None of the cases cited by the Fifth Circuit Court of Appeals specifically indicate that the conclusions reached in the Donna Bailey Affidavit of "default,"

"deficiency," or the "ownership of the note" had been adequately supported. The case of **RTC v. Camp**, 965 F.2d 25 (5th Cir. 1992), dealt only with the issue of whether or not an Affidavit had been made on "personal knowledge". The **Topalian v. Ehrman** case, 954 F.2d 1125 (5th Cir. 1992), dealt with the factual Affidavits proffered by the Defendants supporting in factual detail their claims of statute of limitation preclusion of the claim. The **Colony Creek, Ltd. v. RTC** case, 941 F.2d 1323 (5th Cir. 1991), did not turn on the propriety of the evidence contained in the Movant's Affidavit, but on the fact that usurious interest was not present on the face of the promissory note in question.

What is germane to the Fifth Circuit Court of Appeals ruling is the plethora of cases from its own decisions in which statements of ultimate conclusions of law are not competent summary judgment evidence and

are, therefore, insufficient to defeat or support a Motion for Summary Judgment. See, Galindo v. Precision American Corp., 754 F.2d 1212 (5th Cir. 1985); Gossett v. Du-Ra-Kel Corp., 569 F.2d 869 (5th Cir. 1978); Benton-Volvo-Metairie, Inc. v. Volvo Southwest, Inc., 479 F.2d 135 (5th Cir. 1973); Dawkins v. Green, 412 F.2d 644 (5th Cir. 1969); Bridges v. Internal Revenue Service, 433 F.2d 299 (5th Cir. 1970); Chavers v. Exxon Corp., 716 F.2d 315 (5th Cir. 1983); Pitts v. Shell Oil Company, 463 F.2d 331 (5th Cir. 1972); Fowler v. Southwestern Bell Telephone & Telegraph, 343 F.2d 150 (5th Cir. 1965).

The mere fact that a promissory note is connected to this case should not subject the Applicants to the conclusion reached by the Fifth Circuit Court of Appeals that they are "grist" for such summary judgment procedures. In fact, as indicated, the bald assertions of ultimate facts, and the continued policy of this Court in disallowing Movants to utilize

such methodologies to support inappropriate motions for summary judgment, should not be disturbed, especially in the current factual situation and the absence of supporting essential elements of Movants cause of action.

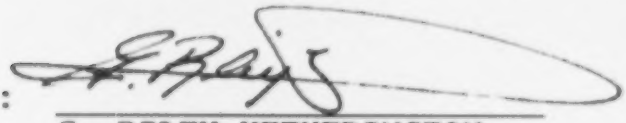
CONCLUSION

This Court should review this case to reconfirm adherence to strict due process and procedural requirements governing the notice required and proof mandated in summary judgment procedures to assure the protection of private property interests and judicial procedural propriety.

WHEREFORE PREMISES CONSIDERED, Applicants pray that a Writ of Certiorari be granted.

Respectfully submitted,

G. RILEY HETHERINGTON & ASSOCIATES

BY: 

G. RILEY HETHERINGTON
1254 FM 1463 Road
Katy, Texas 77494
(713) 395-2600
(713) 395-4488
Texas Bar No. 09554500
Fed. I.D. #6015
COUNSEL OF RECORD FOR
JACK C. OGG, FOXWOOD
MANAGEMENT COMPANY and
CHARLES L. SOWELL

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Petition for Writ of Certiorari was sent via United States postal system, certified mail, return receipt requested, postage prepaid and addressed as follows:

Mr. Patrick L. Mahaffey, Pro Se
1212 Gray Moss
Houston, Texas 77055

Mr. Michael B. Lee
Ms. Rachel A. Fefer
Fouts & Moore
5555 San Felipe, 17th Floor
Houston, Texas 77056

Mr. Richard B. Sanders
Bracewell & Patterson
2900 South Tower Pennzoil Place
Houston, Texas 77002-2781

Mr. Geoffrey Bracker
Sewell & Rigs
333 Clay Avenue, Suite 800
Houston, Texas 77002

DATE: 3-17-94

898-92039

APPENDIX

TABLE OF CONTENTS

SECT.	DOCUMENT	DATE	PAGE
A	Fifth Circuit Court of Appeals Opinion	1-14-94	1-31
B	Order-District Court Southern District of Texas; Houston Division	2-22-91	1-4
C	Order-District Court Southern District of Texas; Houston Division	4-14-92	1-5
D	Judgment-District Court Southern District of Texas; Houston Division	4-28-92	1-3
E	Fifth Circuit Court of Appeals; Order on Rehearing	2-9-94	1-2
F	Constitution & Statutes		
	U.S. Const. Amend. 5		1
	U.S. Const. Amend. 14		1-2
	Federal Rule of Civil Procedure 56(c)		3
	Texas Bus. & Comm. Code 9.504(c)		3-4

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 92-2434

FEDERAL DEPOSIT INSURANCE CORPORATION as receiver for GIBRALTAR SAVINGS, GIBRALTAR SAVINGS ASSOCIATION,

Plaintiff-Appellee,

FIRST GIBRALTAR BANK, FIRST GIBRALTAR BANK, FSB,

Intervenor-Plaintiff-Appellee,

versus

FOXWOOD MANAGEMENT COMPANY, ET AL.,

Defendants,

FOXWOOD MANAGEMENT COMPANY, CHARLES L. SOWELL and JACK C. OGG,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

---

(CA-H-89-289)

Before JOHNSON, GARWOOD and JONES, Circuit Judges.

GARWOOD, Circuit Judge:

Defendants-appellants, Foxwood Management Company (Foxwood), Charles L.

Sowell (Sowell), and Jack C. Ogg (Ogg), appeal two summary judgments respectively granted in favor of the Federal Deposit Insurance Corporation (FDIC) as plaintiff and the First Gibraltar Bank (First Gibraltar) as intervenor-plaintiff. First Gibraltar moved to obtain a deficiency judgment on the remaining balance of defendant's promissory note and guaranty and the FDIC moved to dismiss defendants' counterclaims and defenses to the promissory note now held by First Gibraltar. We affirm the judgment in favor of the FDIC on the ground that defendants' claims are moot. We affirm the judgment in favor of First Gibraltar on the ground that no defenses were raised in the court below to the prima facie case presented by First Gibraltar.

Facts and Proceedings Below

On January 11, 1980, Foxwood Properties Ltd. # 1 (Foxwood Properties), a Texas limited partnership, executed a promissory

note in favor of Gibraltar Savings Association (Gibraltar Savings) secured by a deed of trust on several lots. Foxwood is a Texas general partnership and is the general partner of Foxwood Properties. On behalf of Foxwood Properties, the note and deed of trust were signed by Foxwood by all of its (Foxwood's) general partners: Thomas G. Sumner (Sumner)1, Sowell, Ogg, and Patrick Mahaffey (Mahaffey), each of whom signed.2 The promissory note was modified and replaced by a new note on March 30, 1981, again executed by Foxwood Properties by its general partner Foxwood through Foxwood's general partners Sumner, Sowell, Ogg, and Mahaffey, each of whom signed as such. Sumner, Sowell, Ogg, and Mahaffey executed a March 30, 1981 guaranty agreement as additional security for

---

1 Sumner filed for bankruptcy after removal and is not a party to this appeal.

2 Mahaffey was a defendant below, but did not file a notice of appeal and is not currently before this court.

this note. The loan agreement was again modified and some of the terms concerning the disposition of collateral were changed on July 15, 1983.

Foxwood Properties and the defendants subsequently defaulted on the March 30, 1981 note. Gibraltar conducted a nonjudicial foreclosure on the collateral, reducing the balance due on the note to $1,534,532.45 plus interest.

This dispute arose in 1987 when Gibraltar Savings sued Foxwood, Sumner, Sowell, Ogg and Mahaffey to collect the deficiency due on this March 30, 1981 promissory note and guaranty agreement in Texas state court. Foxwood Properties has never been a party to this action. The state court defendants raised several counterclaims and defenses including breach of fiduciary duty, breach of agreement to form a joint venture, wrongful foreclosure, and violations

of the Texas Deceptive Trade Practices Act (DTPA).

On December 28, 1988, Gibraltar Savings was declared insolvent. The FSLIC subsequently transferred substantially all of Gibraltar Savings' assets, including the promissory note and guaranty agreement to First Gibraltar Bank (First Gibraltar). Although the FSLIC transferred the note and guaranty - the right to be paid - to First Gibraltar, the FSLIC agreed to remain liable for most defenses to the note and for other claims arising from the transaction between Gibraltar Savings and defendants, including defendants' counterclaims pending in this action.

On January 25, 1989, the FSLIC removed this case to federal court and moved to dismiss defendants' counterclaims. This motion was denied. The FDIC then replaced the FSLIC as the party defending the counterclaims.

On November 29, 1990, First Gibraltar intervened to assert its rights as holder of the note, claiming that all of the defendants were personally liable on the note. First Gibraltar's complaint in intervention did not seek recovery on the personal guarantees of defendants.3

On January 31, 1991, the FDIC filed a motion for summary judgment, forty-eight pages long plus ninety-six pages of exhibits, seeking dismissal of defendants' counterclaims. The FDIC served the motion on two defendants, Sowell, through counsel of record Michael Landrum, and Sumner, through counsel of record Joe Holzer, but did not serve the motion on defendants Foxwood (represented by counsel of record Charles Wist, now withdrawn), Ogg (pro se), or Mahaffey (pro se). On several prior

3 First Gibraltar's summary judgment motion based defendants' liability on the March 30, 1981, note and on the guarantee. The judgment below based defendants' liability only on the note.

occasions, the FDIC had properly served all defendants. On February 22, 1991, the district judge issued an order granting the FDIC's motion for summary judgment. A docket entry on that date reflects that notice of this order was given to all parties. No separate document judgment under Fed. R. Civ. P. 58(b) was entered respecting the FDIC.

On February 28, 1992, First Gibraltar filed a motion for summary judgment seeking a deficiency judgment against defendants on the note and guaranty. Defendants were properly served yet they never made any response to this motion. The district court on April 14, 1992, granted First Gibraltar's motion for summary judgment and rendered judgment in favor of First Gibraltar for $1,534,532.45 plus interest of over a million dollars against Foxwood, Foxwood Properties (not a party to this litigation), Sowell, Ogg and Mahaffey. A separate document Rule 58(b) judgment in favor of First Gibraltar was

entered on April 29, 1992. Defendants appeal both summary judgment orders of the district court.

I. Appellate Jurisdiction

Preliminarily, we address the district court's failure to enter a Rule 58(b) separate document judgment relating to its order granting the FDIC's motion for summary judgment. See, **Theriot v. ASW Well Service, Inc.**, 951 F.2d 84, 85-88 (5th Cir. 1992); **Simmons v. Willcox**, 911 F.2d 1077, 1080 n.6 (5th Cir. 1990). See also, **Bankers Trust Co. v. Mallis**, 98 S.Ct. 1117, 1120-21 n.6 & 7 (1978) (per curiam). A "separate document" is a document briefly describing the judgment of the court issued separately from and in addition to any opinion or order explaining the district court's reasons for its decision. This "separate document" rule applies to all appealable decisions of the district court, whether final or interlocutory. **Theriot**, 951 F.2d at 88. The

separate document rule is not jurisdictional and can be waived by the parties.4 Id. at 87 n.10. Defendants mention in their brief several times that no final judgment was entered, but do not argue that the separate document rule makes their appeal premature or deprives this Court of jurisdiction to hear the appeal. Since neither party moved to dismiss this appeal under **Mallis**, and since the district court's order granting summary judgment has become a final decision, the parties have waived this challenge, and this case is properly before us.

II. Defendants' Counterclaims Against the FDIC

Foxwood and Ogg claim that the summary judgment order in favor of the FDIC should be vacated since the FDIC failed to serve them with its motion for summary judgment.

4 We do not determine the effect of the absence of a Rule 58(b) separate document judgment respecting the FDIC on the rights of Mahaffey, who has never filed a notice of appeal.

Sowell, who joined in defendants' brief, was properly served and cannot complain about the FDIC's failure to serve Foxwood and Ogg. Sowell did not challenge the merits of the district court's decision granting summary judgment in favor of the FDIC.

Turning to the merits, Foxwood and Ogg contend that the summary judgment order in favor of the FDIC must be vacated since they were not served with the FDIC's motion for summary judgment. Fed. R. Civ. P. 56(c) requires that movants for summary judgment serve adverse parties at least ten days before the time fixed for the hearing. This Court strictly enforces the notice requirement of Rule 56(c) to give parties the opportunity to present all of their factual and legal arguments to the district court since summary judgment is a final adjudication of the merits. **Powell v. United States**, 849 F.2d 1576, 1579 (5th Cir. 1988); **Judwin Properties, Inc. v. U.S. Fire Ins.**

Co., 973 F.2d 432, 436-37 (5th Cir. 1992); Western Fire Ins. Co. v. Copeland, 786 F.2d 649, 653 (5th Cir. 1986). "'This Circuit has upheld the strict requirements of notice embodies in Rule 56,' Underwood v. Hunter, 5 Cir., 1979, 604 F.2d 367 and has consistently refused to dispense with the procedural safeguards set forth in the rule." Hanson v. Polk County Land, Inc., 608 F.2d 129, 131 (5th Cir. 1979).

In this case, the district court clearly erred in granting summary judgment to the FDIC since three defendants were not served with the FDIC's motion for summary judgment or informed by the district judge that he was going to decide the FDIC's motion.5

The failure to give notice to nonmoving parties requires us to reverse the district

5 There was no excuse for the FDIC's failure to serve Foxwood, Ogg, and Mahaffey, since all three had been served several times in the past by the FDIC. The FDIC was aware that Wist was still counsel of record for Foxwood as it had served Wist with all other documents involved in this case.

court's summary judgment order unless the error is plainly harmless. Powell, 849 F.2d at 1580; Western Fire, 786 F.2d at 653. "[E]rror in notice is harmless if the nonmoving party admits that he has no additional evidence anyway or if, as in Norman v. McCotter [765 F.2d 504 (5th Cir. 1985)], the appellate court evaluates all of the nonmoving party's additional evidence and finds no genuine issue of material fact." Powell, 849 F.2d at 1582 (fact disputed on appeal made error harmful). Since the lack of notice deprives defendants of making legal arguments and developing the record in support of these arguments as well, errors in notice are only harmless where the unnotified party has no meritorious legal claim or no legal claim that could be meritorious with development of the record. See Underwood v. Hunter, 604 F.2d 367, 369 (5th Cir. 1979).6

6 The FDIC argues that the error was harmless because parties with identical interests were served. We reject this "per se" argument. Identity of interests is no

Ignoring the merits of defendants' counterclaims, the district court dismissed those claims under the prudential mootness doctrine because defendants would recover nothing even if they prevailed on their claims. The district court's holding relied on special rules limiting the liability of the FDIC as receiver to the value of the institution liquidated, based on the Federal Home Loan Bank Board's (FHLBB) determination that Gibraltar Savings was insolvent and unable to pay depositors and secured claimants, let along unsecured claimants.

Defendants assert the error was harmful and their claims were not moot for two reasons. First, defendants argue that the FHLBB determination is not binding because "the continuing change in the financial condition of Gibraltar Savings vis-a-vis the claim process, including redistribution of

---

excuse for the failure to serve. Further, the defendants that were served in this case offered no defense to the FDIC's motion.

claims among and between depositors, secured creditors and unsecured creditors, is dynamic and, by movant's own proof, can change at any time. To preempt such determination based on a 'one time statement' of worthlessness would, therefore, be premature . . . ."

A claim against the FDIC as receiver should be dismissed when there will never be assets available to satisfy the claim. **First Indiana Federal Savings Bank v. FDIC**, 964 F.2d 503, 507 (5th Cir. 1992); **Triland Holdings & Co. v. Sunbelt Service Corp.**, 884 F.2d 205, 208 (5th Cir. 1989); **FDIC v. Browning**, 757 F.Supp. 772 (N.D. Tex. 1989). Whether the FDIC has sufficient assets to satisfy a claim depends on the source of the claim. Where a claim is made against the FDIC in its capacity as receiver for a failed institution, the maximum liability of the FDIC to a claimant is the amount that claimant would receive if the failed institution were liquidated and its claims

paid according to the preference rules of the state in which the institution is located. 12 U.S.C.A. Sect. 1821(i)(2) (1988). See 12 C.F.R. Sect. 569c.11 (1988), amended and redesignated 12 C.F.R. 389.11 (1990), repealed 1991 (state law preferences); **Gulley v. Sunbelt Savings**, F.S.B., 902 F.2d 348, 350 (5th Cir. 1990), cert. denied, 111 S.Ct. 673 (1991) (explaining priority scheme).

The date on which the liability of the FDIC as receiver is fixed, under 12 U.S.C. Sect. 1821(i)(2), is the day that the FHLBB determines that an institution is insolvent and turns over the failed institution to the FDIC as receiver. We have stated that the FHLBB's determination of insolvency and the worthlessness of unsecured creditor claims is binding and cannot be collaterally attacked in claims against the FDIC. First Indiana, 964 F.2d at 506-07 n.7; 281-300, **Joint Venture v. Onion**, 938 F.2d 35, 38-39 (5th Cir. 1991), cert denied, 112 S.Ct. 933

(1992). See also, FDIC v. Browning, 757 F.Supp. 772, 773 (N.D. Tex. 1989).[7] Subsequent transactions by the FDIC in disposing of assets and settling liabilities of failed institutions do not affect the FHLBB's insolvency determination and do not affect the district court's reliance thereon or its determination of insolvency. Thus, even if a defendant obtained a judgment for money damages against the FDIC, the amount of damages owed by the FDIC is the amount that a defendant is entitled to in liquidation-nothing.

The FHLBB determined in 1988 that Gibraltar Savings was insolvent and unable to pay the claims of depositors or secured creditors, let alone unsecured creditors. Appellants do not question the accuracy of

---

7 FHLBB findings can be directly challenged under the Administrative Procedure Act, Onion, 938 F.2d at 38, but defendants failed to appeal the FHLBB findings as to Gibraltar Savings. More than three years passed between the FHLBB determination and the FDIC motion for summary judgment.

that determination when made or even claim that it was not accurate as of the trial court's judgment (or is not accurate now); they only claim that it "was possible" that the receivership's financial condition might change over time so that assets would become available to make some payment to unsecured creditors. That theoretical possibility does not prevent mootness here.

Second, defendants claim that the failure to notify them preventing them from using successful counterclaims against the FDIC to offset their liability on the note to First Gibraltar. The right of offset is inapplicable here because the FDIC does not hold defendants' note against which the claims would be offset. First Indiana, 964 F.2d at 508; Campbell Leasing, Inc. v. FDIC, 901 F.2d 1244, 1249 (5th Cir. 1990); FDIC v. Texas Country Living, Inc., 756 F. Supp. 984, 989 (E.D. Tex. 1990). Thus, defendants have no right to offset their liability on the

note held by First Gibraltar by counterclaims against the FDIC.

Although this Court has a strong tradition of requiring notice to allow parties to present their case, there are no issues of fact or law argued in defendants' briefs that would change the holding of the district court. Moreover, the summary judgment order here was interlocutory and defendants allowed the balance of the case pending before the district court to proceed for over a year without raising this lack of notice issue in the district court. Since the error below was plainly harmless, we affirm the FDIC's summary judgment against Foxwood and Ogg. We affirm the FDIC's summary judgment against Sowell because he has not challenged it on appeal.

III. First Gibraltar's Motion for Summary Judgment

After proper notice to all parties to the suit, First Gibraltar was granted a

summary judgment holding Foxwood Properties, Foxwood, Ogg, Sowell, and Mahaffey jointly and severally liable for the deficiency balance due on the promissory note plus interest and attorneys' fees.

Preliminarily, all parties agree that the district court erred in granting summary judgment against "Foxwood Properties, Ltd. #1," a party not named or served in this lawsuit. They request that we reform the judgment to that extent. We also note that "Foxwood Properties Ltd. #1" was named in the district court's judgment, but not in its order. Therefore, the judgment of the district court against Foxwood Properties Ltd. #1 is vacated.

We now turn to defendants' other challenges to the summary judgment in favor of First Gibraltar. A district court may enter a summary judgment when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of

law. **Judwin**, 973 F.2d at 435 (citing Celotex **Corp. v. Catrett**, 106 S.Ct. 2548 (1986)). The movant for summary judgment has the initial burden of establishing the absence of genuine dispute over material facts that it is entitled to a judgment as a matter of law. Id.; Fed. R. Civ. P. 56(e).8 When no opposition is made to a motion for summary judgment, the movant is only required to make a prima facie showing of its right to judgment. **Savers Federal S & L v. Reetz**, 888 F.2d 1497, 1501 (5th Cir. 1989); **Eversley v. MBank Dallas**, 843 F.2d 172, 174 (5th Cir. 1988). In considering whether a movant presented a sufficient prima facie case, the nonmovant is not entitled to offer rebuttal evidence on appeal or to raise there new issues of fact or law. **Reetz**, 888 F.2d at 1501; **Eversley**, 843 F.2d at 174. We will

---

8 "Such a showing shifts the burden of production to the non-movant to delineate specific facts which demonstrate a genuine issue for trial." Judwin, 973 F.2d at 435.

only examine the summary judgment evidence offered below and determine whether it suffices to support the judgment in movant's favor. **Reetz**, 888 F.2d at 1501 n.4. We look skeptically at appeals from summary judgments when no defenses were raised below to discourage "trial by ambush." Id.

Despite wholly failing to make any response whatever in the district court, defendants contend on appeal that the district court erred in granting this summary judgment because First Gibraltar failed to make its prima facie showing of facts supporting the elements of its cause of action. The elements of an action for breach of a promissory note and guaranty that First Gibraltar had to establish are: 1) that the note and guaranty existed; 2) that defendants signed the note and guaranty; 3) that the plaintiff legally owned and held the note and guaranty; 4) that default occurred; and 5) that a certain balance remains due and

payable on the note. Clark v. Dedina, 658 S.W.2d 293, 295 (Tex. App. Houston [1st Dist.] 1983], writ dismissed; NCNB Texas Nat'l Bank v. Goldencrest Joint Venture, 761 F.Supp. 32, 34 (N.D. Tex. 1990).

Defendants' main argument is that First Gibraltar failed to prove that they were in default. Defendants claim that First Gibraltar's only evidence of default, an affidavit by its vice president, was conclusory and insufficient to meet its burden of presenting a prima facie case.

We have stated that "unsupported allegations or affidavits setting forth 'ultimate or conclusory facts and conclusions of law' are insufficient to either support or defeat a motion for summary judgment." Galindo v. Precision American Corp., 754 F.2d 1212, 1216 (5th Cir. 1985) (citing C. Wright, et al., Federal Practice and Procedure: Civil 2d Sect. 2738 (1983)); May v. Department of Air Force, 777 F.2d 1012, 1015 (5th Cir.

1985). "We have long recognized that mere statements of conclusions of law or ultimate fact cannot shift the summary judgment burden to the nonmovant." Galindo, 754 F.2d at 1221. "[T]here is a level of conclusoriness below which an affidavit must not sink if it is to provide the basis for a genuine issue of material fact" or for summary judgment. Orthopedic & Sports Injury Clinic v. Wang Laboratories, Inc., 922 F.2d 220, 224-25 (5th Cir. 1991); Lechuga v. Southern Pacific Transportation Co., 949 F.2d 790, 798 (5th Cir. 1992) (affidavit insufficient if conclusory, unspecific, or based on conjecture); Transcontinental Gas v. Transportation Insurance Co., 953 F.2d 985, 995 (5th Cir. 1992). We look suspiciously at conclusory affidavits by experts on issues such as whether a party was grossly negligent, especially where the affidavit does not provide the foundation for the expert's opinion. Id.

There is also a middle level of conclusoriness where we will accept the contents of a conclusory affidavit as true, if they are not challenged below.9 **FTC v. Camp**, 965 F.2d 25, 29 (5th Cir. 1992) ("We would not hesitate to reverse summary judgment had Appellants pointed to evidence in the record . . . ."); **Topalian v. Ehrman**, 954 F.2d 1125 (5th Cir. 1992) (where debtor offered no evidence to rebut deposition testimony, summary judgment on note affirmed); **Colony Creek, Ltd. v. RTC**, 941 F.2d 1323, 1325 (5th Cir. 1991).10 This is

---

9 A court cannot grant summary judgment merely because the nonmovant failed to oppose the motion. John v. State of Louisiana, 757 F.2d 698 at 707-09 (5th Cir. 1985). In John, id. at 707-09, we held that a local rule from the Western District of Louisiana requiring a response to a motion by the opposing party, subject to the penalty that a court will grant the unanswered motion, was inconsistent with Fed. R. Civ. P. 56. See Local Rule 6(E), United States District Court for the Southern District of Texas.

10 We also accept affidavits that a procedurally defective, where the defect was not challenged below. McCloud River R. Co. v. Sabine River Forest Products, 735 F.2d

the same standard we apply to evidence or testimony, including hearsay, not objected to at trial, which we consider as valid evidence on appeal. See, e.g., Edward Cleary, McCormick on Evidence 140,141 (1984). There is no reason to apply a different rule to unobjected to summary judgment "evidence."

We have written that "because of the relative simplicity of the issues involved, suits to enforce promissory notes 'are among the most suitable classes of cases for summary judgment.'" **Colony Creek**, 941 F.2d at 1325-26 (5th Cir. 1991), (citing **Lloyd v. Lawrence**, 472 F.2d 313, 316 (5th Cir. 1973)). See also, **FDIC v. Selaiden Builders, Inc.**, 973 F.2d 1249 at 1253 (5th Cir. 1992). Statements concerning who owns a promissory note, whether a party has defaulted on a note, or what the outstanding balance is on a note are often proven with somewhat

---

879, 882 (5th Cir. 1982) (unsworn and untimely).

conclusory testimony.11 Such assertions are usually easy to rebut with a contrary affidavit or with evidence such as cancelled checks, other receipts for payment, or the like. These differ from a statement like "defendant was grossly negligent," which is in effect a wholly general normative conclusion.

To prove that defendants were in default, First Gibraltar offered Donna Bailey's affidavit, which states: "Foxwood Properties, Ltd. #1, Foxwood Management, Sumner, Sowell, Ogg, and Mahaffey defaulted on the note . . . ." This affidavit, though it stated no supporting specifics, directly addressed the issue whether defendants had defaulted and did not leave material questions unanswered. Compare **Galindo**, 754

---

11 Cf. Texas Rule of Civil Procedure 185, under which a sworn affidavit stating that a note is due "shall be taken as prima facie evidence thereof, unless the party resisting such claim shall file a written denial. . . ."

F.2d at 122 (affidavit insufficient because it left unanswered questions). While of a somewhat conclusory nature, this affidavit sufficed to present a prima facie case on the issue of default and is binding since it was not challenged below. Had defendants either challenged this affidavit below as too conclusory or had they offered contrary evidence that they were not in default, the affidavit might have been rebutted and summary judgment not granted. See Galindo, 754 F.2d at 1221-1222 (affidavit challenge below rejected on appeal).

Defendant's second argument is that the above stated elements required First Gibraltar to place in evidence the Deed of Trust securing the note. This argument is without merit. The Deed of Trust was in the record, it was just mislabeled.

Next, defendants complain that a promissory note of January 11, 1980, was not offered in evidence in violation of the first

element. They claim that the March, 1981, promissory note that is the basis of this lawsuit was subject to the terms of the January note, meaning that the complete note was not offered in evidence. This argument is without merit. The language of the March 1981 note does not incorporate the terms of the prior note, it merely refers to it, so the prior note need not be in the record. See, **Continental National Bank of Fort Worth v. Conner**, 214 S.W.2d 928, 930-931 (Tex. 1948).

Defendants claim that a sixth element exist under Texas law., that in a deficiency suit movant must prove that dispositions of real and personal collateral were commercially reasonable. In **Greathouse v. Charter Nat'l Bank**, 851 S.W.2d 173 (Tex. 1992), the Texas Supreme Court held that this element must be proven in all cases where the collateral is personal property but the court left open the issue whether it must be proven

where real property is used as collateral. Whether the element of commercial reasonableness applies to real property is an issue of law that was not raised in the court below, and we will not consider it on appeal. Reetz, 888 F.2d at 1501 ("even a pleaded theory was waived when it was not raised in opposition to a motion for summary judgment."). Since no evidence in the record below showed that movants had foreclosed on any personal property, it does not matter whether movants proved that a personal property foreclosure was commercially reasonable. These arguments are without merit.

Defendants also contend that First Gibraltar failed to offer evidence that they were personally liable on the note or guaranty. Defendants signed the promissory note in their capacity as general partners of Foxwood, which was acting as the general partner of the maker, Foxwood Properties.

Parties who sign a note in a representative capacity are normally not personally liable merely because they signed the note in that capacity. Regardless of whether they signed a note, parties can still be personally liable because of their legal relationship to the maker of the note. Under Texas law, general partners are liable for partnership debts and can be sued directly by third parties on partnership debts without the partnership being named as a party to the lawsuit. Tex. Rev. Civ. Stat. Ann. art. 6132(b) Sect. 15 (Vernon Supp. 1993); **Foster v. Daon Corp.**, 713 F.2d 148, 151 (5th Cir. 1983). Here, defendants were personally liable on the note because they were general partners in a general partnership that was the general partner in the limited partnership that was the maker of the note. Because defendants were personally liable on the note, there was no need for First Gibraltar to prove that defendants were

personally liable for signing the guaranty agreement. This argument is also without merit.

Defendants make a one-sentence argument that First Gibraltar did not prove its ownership of the note. The note appears to be unendorsed. Yet, based on **Camp**, 965 F.2d at 29, defendants have not given us a legitimate fear that First Gibraltar did not own the note. This contention is without merit.

Conclusion

Accordingly, the judgment of the district court against Foxwood Management Company, Ogg, and Sowell is affirmed. The judgment against Foxwood Properties Ltd. #1 is vacated.

AFFIRMED in part; VACATED in part

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

THE FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for GIBRALTAR SAVINGS ASSOCIATION	*	
Plaintiff,	*	
V.	*	CIVIL ACTION NO.
	*	H-89-289
FOXWOOD MANAGEMENT COMPANY, CHARLES L. SOWELL, JACK C. OGG, and PATRICK L. MAHAFFEY,	*	
Defendants.	*	

ORDER

Pending before this Court is a motion for summary judgment (Document #18) filed by plaintiff Federal Deposit Insurance Corporation ("FDIC"), as receiver for Gibraltar Savings Association ("Gibraltar").

FDIC filed the motion for summary judgment on January 31, 1991, and the motion was thereafter set for submission on February 20, 1991 pursuant to Local Rule 6(D). None of the defendants has filed a response to the motion pursuant to Local Rule 6(E).

FDIC moves for summary judgment on the defendants' counterclaims on grounds that any potential liability to the defendants is precluded by section 212 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Publ. L. No. 101-73 [hereinafter FIRREA], 1989 U.S. Code Cong. & Admin. News (103 Stat.) 183, 242 (to be codified at 12 U.S.C. Sect. 1821(i)(2)). That section provides:

> The maximum liability of [FDIC], acting as receiver or in any other capacity, to any person having a claim against the receiver or the insured depository institution for which such receiver is appointed shall equal the amount such claimant would have received if [FDIC] had liquidated the assets and liabilities of such institution ....

The defendants do not contest the FDIC's assertion that the Gibraltar receivership estate is insolvent. In placing the failed savings and loan institution in receivership, the Federal Home Loan Bank Board ("FHLBB") determined that the institution's assets were

insufficient to pay the amounts owed to secured creditors and depositors. See Appointment of Receiver for Gibraltar Savings Association, Houston, Texas Under Section 406(c)(1)(B), Resolution No. 88-1408P, at 4. Under the applicable priority regulations of the FHLBB and the Texas depositor preference statute, unsecured creditors such as the defendants in this suit would have received nothing in a liquidation of the failed institution. See 12 C.F.R. Sect. 569c.11 (1989); Tex. Rev. Civ. Stat. Ann. art. 852a, Sect. 8.09(g) (Vernon Supp. 1990). Under FIRREA, therefore, FDIC cannot be held liable by the defendants for the alleged misdeeds of the failed institution.

Based on the foregoing, and after having considered the motion and the applicable law, the Court

ORDERS that the FDIC's motion for summary judgment (Document #18) is GRANTED. The Court hereby grants summary judgment,

pursuant to Fed. R. Civ. P. 56(c), in favor of FDIC as to the counterclaims of defendants Foxwood Management Company, Charles L. Sowell, Jack C. Ogg, and Patrick L. Mahaffey.

SIGNED at Houston, Texas, on this the 22nd day of February, 1991.

S/S DAVID HITTNER, JUDGE
DAVID HITTNER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

THE FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for GIBRALTAR SAVINGS ASSOCIATION	*	
Plaintiff,	*	
V.	*	CIVIL ACTION NO. H-89-289
FOXWOOD MANAGEMENT COMPANY, CHARLES L. SOWELL, JACK C. OGG, and PATRICK L. MAHAFFEY,	*	
Defendants.	*	

ORDER

Pending before this Court is a motion for summary judgment (Document #28) filed by plaintiff/intervenor First Gibraltar Bank, FSB ("First Gibraltar"). After having considered the motion and the applicable law, the Court determines that the motion should be granted.

On March 30, 1981, defendants Foxwood Management Company ("Foxwood"), Thomas G. Sumner ("Sumner"), Charles L. Sowell ("Sowell"), Jack C. Ogg ("Ogg") and Patrick L. Mahaffey ("Mahaffey") executed a

promissory note in the principal amount of $2,300,000.00 ("the Note"). Plaintiff Gibraltar Savings Association ("Gibraltar Savings") was the owner and holder of the Note. On the same day, Sumner, Sowell, Ogg, and Mahaffey executed a guaranty agreement ("Guaranty") guaranteeing payment of the Note. Defendants further secured payment of the Note by executing a deed of trust ("Deed of Trust") covering specific real property in Harris County.

Defendants executed a loan modification agreement ("Agreement") on July 15, 1983. Subsequently, defendants defaulted on the Note, and, in 1987, Gibraltar Savings foreclosed on the lien created by the Deed of Trust. The property was sold to the highest bidder for $1,824,000.00, leaving a deficiency of $1,534,532.45.

In March 1987, Gibraltar Savings filed this action in the 80th Judicial District Court of Harris County, Texas, to recover on

the Note and the Guaranty. Thereafter, First Gibraltar acquired substantially all the assets of Gibraltar Savings from the Federal Deposit Insurance Corporation ("FDIC") in its capacity as Receiver for Gibraltar Savings. First Gibraltar is now the owner and holder of the Note, Guaranty, Agreement, and Deed of Trust. In January 1989, the FDIC intervened in the state court action as proper plaintiff and removed the action to this Court. First Gibraltar intervened in this action in December 1990.

The instant motion for summary judgment was filed on February 28, 1992. The submission date was set at March 19, 1992, pursuant to Local Rule 6(D). Foxwood, Sowell, Ogg, and Mahaffey[1] have failed to respond in a timely manner. The motion is

---

1 First Gibraltar does not seek summary judgment against Sumner, as he filed for protection under the Bankruptcy Code and is no longer a defendant in this case.

therefore deemed unopposed pursuant to Local Rule 6(E).

Through its motion and attached exhibits, First Gibraltar has made out a prima facie case as to the defendants' liability on the Note at issue. See Eversley v. MBank Dallas, 843 F.2d 172, 174 (5th Cir. 1988). In turn, the defendants have failed to raise a genuine issue of material fact as to any affirmative defenses to payment. As defendants would bear the burden of proof on any such affirmative defenses at trial, First Gibraltar is entitled to summary judgment. See Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986); see also Trans-Continental Finance Corp. v. Summit Nat'l Bank, 761 S.W.2d 575, 577 (Tex.App. -- Fort Worth 1988, no writ) (affirming summary judgment because plaintiff had conclusively established amount owing on note).

Based upon the foregoing, the Court

ORDERS that First Gibraltar's motion for summary judgment against Foxwood, Sowell, Ogg, and Mahaffey (Document #28) is GRANTED. The Court grants summary judgment in favor of First Gibraltar pursuant to Fed. R. Civ. P. 56(c).

SIGNED at Houston, Texas, on this the 14th day of April, 1992.

S/S DAVID HITTNER
DAVID HITTNER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

THE FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for GIBRALTAR SAVINGS ASSOCIATION	*	
Plaintiff,	*	
V.	*	CIVIL ACTION NO.
	*	H-89-289
FOXWOOD MANAGEMENT COMPANY, CHARLES L. SOWELL, JACK C. OGG, and PATRICK L. MAHAFFEY,	*	
Defendants.	*	

JUDGMENT

On April 14, 1992, this Court granted First Gibraltar Bank, FSB's ("First Gibraltar") Motion for Summary Judgment.

It is therefore ORDERED that First Gibraltar be awarded judgment as follows:

1. First Gibraltar is awarded the following as damages against Foxwood Management Company, Foxwood Properties, Ltd. #1, Charles Sowell, Jack Ogg, and Patrick Mahaffey;

(a) Principal owed on the note in the amount of $1,534,532.45;

(b) Interest due on the note in the amount of $1,329,620.26, with a per diem from April 28, 1992 in the amount of $756.75 until the date this judgment is signed;

(c) Attorneys' fees in the amount of 10% of the outstanding principal and interest outlined under 1(a) and (b) of this Judgment;

(e) Post-judgment interest from the date this judgment is signed at the rate of 4.55%.

2. Foxwood Management Co., Foxwood Properties, Ltd. #1, Charles Sowell, Jack Ogg, and Patrick Mahaffey are jointly and severally liable for the damages awarded in this Judgment.

3. All relief not expressly granted is expressly DENIED.

SIGNED this 28th day of April, 1992.

S/S/ DAVID HITTNER, JUDGE
DAVID HITTNER
United States District Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 92-2434

FEDERAL DEPOSIT INSURANCE CORPORATION as receiver for GIBRALTAR SAVINGS, GIBRALTAR SAVINGS ASSOCIATION,

Plaintiff-Appellee,

FIRST GIBRALTAR BANK, FIRST GIBRALTAR BANK, FSB,

Intervenor-Plaintiff-Appellee,

versus

FOXWOOD MANAGEMENT COMPANY, ET AL.,

Defendants,

FOXWOOD MANAGEMENT COMPANY, CHARLES L. SOWELL and JACK C. OGG,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

---

ON PETITION FOR REHEARING

(February 9, 1994)

Before JOHNSON, GARWOOD and JONES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

S/S DAVID HITTNER, JUDGE
DAVID HITTNER
United States Circuit Judge

UNITED STATES CONSTITUTION
AMENDMENT FIVE

Amendment V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION
AMENDMENT FOURTEEN

Amendment XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall bridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice

President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

FEDERAL RULE OF CIVIL PROCEDURE RULE 56(C)

Rule 56. Summary Judgment

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixing for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

TEXAS BUSINESS & COMMERCE CODE SECTION 9.504(c)

Section 9.504. Secured Party's Right to Dispose of Collateral After Default; Effect of Disposition.

(c) Disposition of the collateral may]be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place

of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale. In the case of consumer goods no other notification need be sent. In other cases notification shall be sent to any other secured party who has a security interest in the same collateral and who has duly filed in the office of the Secretary of State or of the county clerk in the proper county in this state a financing statement indexed in the name of the debtor or from whom the secured party has received (before sending his notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.

Supreme Court, U.S.
FILED
APR 29 1994
OFFICE OF THE CLERK

(2)

No. 93-1469

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

FOXWOOD MANAGEMENT COMPANY,
CHARLES L. SOWELL and JACK C. OGG,
Defendants/Applicants/Petitioners,
v.
THE FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR GIBRALTAR SAVINGS ASSOCIATES and FIRST GIBRALTAR BANK, FSB,
Plaintiff/Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

---

BRIEF IN OPPOSITION

MICHAEL KUHN
BRACEWELL & PATTERSON, L.L.P.
2900 So. Tower Pennzoil Place
711 Louisiana St., Ste. 2900
Houston, TX 77002-2178
(713) 223-2900
Texas Bar No. 11757500
Fed. I.D. No. 484

Counsel of Record for First Gibraltar Bank

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

13 pp

TABLE OF CONTENTS

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 3

Respondent Was Not Required to Prove Commercial Reasonableness (Response to Applicants' Point Number Three) 3

Respondent Proved Every Element Necessary To Recover on the Note and Guaranties (Response to Applicants' Point Number Four) 5

CONCLUSION 10

TABLE OF AUTHORITIES

Cases	Page No.
Celotex Corp. v. Catrett, 106 S.Ct. 2548 (1986)	9
Continental National Bank of Fort Worth v. Conner, 214 S.W. 2d 928, 930-931 (Tex. 1948)	7
Foster v. Daon Corp., 713 F.2d 148, 151 (5th Cir. 1983)	8
Greathouse v. Charter National Bank, 851 S.W. 2d 173 (Tex. 1992)	3
Saver Federal S&L v. Reetz, 888 F.2d 1497, 1501 (5th Cir. 1989)	5

STATEMENT OF THE CASE

The statement of the case contained in the Petition for Writ of Certiorari filed by Foxwood Management Company, Charles L. Sowell, and Jack C. Ogg ("Applicants") is an accurate statement of the case and the proceedings in the Court of Appeals and the Federal District Court.

SUMMARY OF THE ARGUMENT

First Gibraltar's ("Respondent") Brief in Opposition to Applicants' Petition for Writ of Certiorari deals solely with Point Numbers Three and Four of Applicant's Petition. In Point Number Three, Applicants argue that the Fifth Circuit Court of Appeals erred in holding that the Respondent was not required to prove commercial reasonableness of its foreclosure. This argument is without merit. Applicants failed to file a response to Respondent's Motion for

Summary Judgment. Consequently, there is no evidence in the record to show that Respondents foreclosed on any personal property. Therefore, Respondents were not required to prove a personal property foreclosure was commercially reasonable.

In Point Number Four, Applicants argue that Respondent failed to meet its burden of proving that it was entitled to summary judgment on the note and guaranties under Rule 56 of the Federal Rules of Civil Procedure. Applicants have again failed to mention to this court that they have waived all of the arguments contained in Point Number Four by virtue of their failure to file a response to Respondent's Motion for Summary Judgment. The only question before this court is whether Respondent's summary judgment

evidence proved every element necessary to recover under the note and guaranties. Clearly, the Respondent met its burden of proof.

ARGUMENT

Respondent Was Not Required to Prove Commercial Reasonableness
(Response to Applicants' Point Number Three)

In Greathouse v. Charter National Bank, 851 S.W. 2d 173 (Tex. 1992), the Texas Supreme Court held that commercial reasonableness must be proven in all cases where the foreclosed collateral is personal property. Applicants claim that because the Deed of Trust attached to Respondent's Motion for Summary Judgment referred to certain personal property, Respondent was required to prove commercial reasonableness. However,

Applicants cannot point to any evidence in the record that would indicate that personal property was foreclosed on by Respondent. Presumably, Applicants could have introduced such evidence in their response to Applicants' Motion for Summary Judgment. However, Applicants chose not to file a response.

As pointed out by the Fifth Circuit in its opinion, appellate courts have traditionally looked skeptically at appeals from summary judgments where no defenses were raised in the summary judgment proceeding to discourage "trial by ambush." This appeal is a classic "trial by ambush." Applicants have alleged, for the first time, that personal property was foreclosed on during the foreclosure proceeding. When no

opposition is made to motion for summary judgment, the moving party is only required to make a prima facie showing of its right to judgment. Saver Federal S&L v. Reetz, 888 F.2d 1497, 1501 (5th Cir. 1989). Respondent made that prima facie showing and this "trial by ambush" should not be allowed.

Respondent Proved Every Element Necessary To Recover on the Note and Guaranties
(Response to Applicants' Point Number Four)

In their Point Number Four, Applicants argue that Respondent did not prove all of the elements necessary to recover under the note and guaranties. Applicants' arguments are so numerous that they can only be characterized as the shotgun approach to appellate review: Shoot as many pellets as possible and hope

one hits the target. What Applicants fail to recognize is that by failing to file a response to Respondent's Motion for Summary Judgment in the district court, Applicants have waived all of these arguments.

Applicants first argue that the Deed of Trust was not included in the summary judgment evidence. This is a misstatement of fact. The Deed of Trust was included as summary judgment evidence, but simply mislabeled. Consequently, all of Applicants' arguments related to the absence of the Deed of Trust are without merit.

Applicants next argue that summary judgment should not have been granted because a "companion document" was not attached to the note marked as Exhibit "A"

to Respondent's Motion for Summary Judgment. However, the language of the note attached as Exhibit "A" did not incorporate the terms of the prior note, it merely referred to it. Consequently, the prior note need not be included in the record. Continental National Bank of Fort Worth v. Conner, 214 S.W. 2d 928, 930-931 (Tex. 1948).

Applicants further argue that the Fifth Circuit erred by not requiring Respondent to offer evidence that the Applicants were personally liable on the note and guaranties. By making this argument, Applicants are asking this court to ignore the law in Texas that general partners are liable for partnership debts, and can be sued directed by third parties on partnership debts, without the

partnership being named as a party to the lawsuit. Foster v. Daon Corp., 713 F.2d 148, 151 (5th Cir. 1983). In this case, Applicants were personally liable because they were general partners in a general partnership that was the general partner in the limited partnership that was the maker of the note. There is no need for Applicants to prove that the Respondents were personally liable for signing the guaranty agreements. They are liable as a matter of law.

Applicants' final argument is that the summary judgment evidence contained in an affidavit from one of Respondent's corporate officers is improper summary judgment evidence. This argument is a classic example of "trial by ambush." The affidavit of Donna Bailey, attached to

Respondent's Motion for Summary Judgment as Exhibit "E", outlined (1) that the note and guaranty existed, (2) that the Applicants signed the note and guaranties, (3) that the Respondent legally owned and held the note and guaranties, (4) that the Applicants defaulted under the note and guaranties, and (5) that a certain balance remained due and owing under the note. Consequently, the Respondent made a prima facie showing of its right to judgment. Once Respondent made a prima facie case, the burden of proof shifted to the Applicants to rebut the prima facie case. Celotex Corp. v. Catrett, 106 S.Ct. 2548 (1986). Applicants did not meet their burden of proof. The district court was correct in granting Respondent's Motion for Summary Judgment, and the Fifth

Circuit Court of Appeals was correct in affirming the District Court's ruling.

CONCLUSION

This court should not grant the Applicants' request for a Writ of Certiorari.

WHEREFORE PREMISES CONSIDERED, Respondents pray that Applicants' Petition for Writ of Certiorari be denied.

Respectfully submitted,

Michael Kuhn
2900 So. Tower Pennzoil Place
711 Louisiana St. Ste. 2900
Houston, TX 77002-2178
Texas Bar No. 11757500
Fed. I.D. No. 484
COUNSEL OF RECORD FOR
FIRST GIBRALTAR BANK

Supreme Court, U.S.
FILED
MAY 24 1994
OFFICE OF THE CLERK

No. 93-1469

In the Supreme Court of the United States

OCTOBER TERM, 1993

FOXWOOD MANAGEMENT COMPANY, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER FOR GIBRALTAR SAVINGS AND LOAN ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

DOUGLAS H. JONES
Acting General Counsel

JACK D. SMITH
Deputy General Counsel

ANN S. DUROSS
Assistant General Counsel

ROBERT D. MCGILLICUDDY
MICHELLE KOSSE
Counsel
Federal Deposit Insurance Corporation
Washington, D.C. 20429

14 pp

QUESTION PRESENTED

Whether the court of appeals properly determined that the failure of the Federal Deposit Insurance Corporation, acting as a receiver, to serve each of the petitioners with its motion for summary judgment could be excused as harmless error where all of petitioners' claims were rendered moot by the insolvency of the estate against which those claims were brought.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Capuano v. *United States*, 955 F.2d 1427 (11th Cir. 1992)	9
Davis Elliott International, Inc. v. *Pan American Container Corp.*, 705 F.2d 705 (3d Cir. 1983)	8
Gutwein v. *Roche Laboratories*, 739 F.2d 93 (2d Cir. 1984)	8
Harrington v. *Vandalia-Butler Board of Education*, 649 F.2d 434 (6th Cir. 1981)	7
Ikerd v. *Lapworth*, 435 F.2d 197 (7th Cir. 1970)	7
Kaestel v. *Lockhart*, 746 F.2d 1323 (8th Cir. 1984)	9
Kelsey v. *Minnesota*, 565 F.2d 503 (8th Cir. 1977)	7
Melanson v. *Caribou Reefers, Ltd.*, 667 F.2d 213 (1st Cir. 1981)	7
Milwaukee Typographical Union No. 23 v. *Newpapers, Inc.*, 639 F.2d 386 (7th Cir. 1981)	8-9
National Expositions, Inc. v. *Crowley Maritime Corporation*, 824 F.2d 131 (1st Cir. 1987)	7, 9
Portsmouth Square, Inc. v. *Shareholders Protective Committee*, 770 F.2d 866 (9th Cir. 1985)	9
Powell v. *United States*, 849 F.2d 1576 (5th Cir. 1988)	8
United States Development Corporation v. *Peoples Federal Savings and Loan Association*, 873 F.2d 731 (4th Cir. 1989)	7, 9
Winbourne v. *Eastern Air Lines, Inc.*, 632 F.2d 219 (2d Cir. 1980)	7, 8

Cases—Continued: Page

Yashon v. *Gregory*, 737 F.2d 547 (6th Cir. 1984), cert. denied, 486 U.S. 1032 (1988) 7, 9
Zobrest v. *Catalina Foothills School District*, 113 S. Ct. 2462 (1993) 6

Statutes and rules:

12 U.S.C. 1821(i)(2) (Supp. IV 1992) 3
12 U.S.C. 1821a(a)(5) (Supp. IV 1992) 3
Fed. R. Civ. P.:
Rule 1 6
Rule 56(c) 4, 6, 9

Miscellaneous:

10A Charles Alan Wright et al., *Federal Practice and Procdure* (2d ed. 1983) 8

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1469

FOXWOOD MANAGEMENT COMPANY, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER FOR GIBRALTAR SAVINGS AND LOAN ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A31) is unpublished, but the decision is noted at 15 F.3d 180 (Table). The orders of the district court (Pet. App. B1-B4, C1-C5) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1994. A petition for rehearing was denied on February 9, 1994. Pet. App. E1-E2. The petition for a writ of certiorari was filed on March 18, 1994.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Foxwood Management Company is a Texas general partnership that is a general partner in another partnership named Foxwood Properties Ltd. #1. Petitioners Charles L. Sowell and Jack C. Ogg are general partners in Foxwood Management. On January 11, 1980, Foxwood Properties executed a promissory note payable to Gibraltar Savings Association in the original principal amount of $2,300,000; petitioners' obligations under the note were secured by a deed of trust on certain real property, as well as by personal guaranties of petitioners Sowell and Ogg. Petitioners defaulted on the note in 1985, and Gibraltar Savings conducted a nonjudicial foreclosure sale of the collateral in 1986, which reduced the outstanding balance of the note to about $1,500,000. In 1987, Gibraltar Savings filed suit against petitioners in a Texas state court seeking to recover the balance due under the note. Petitioners raised a variety of defenses, as well as counterclaims resting on, among other things, the Texas Deceptive Trade Practices Act and common-law remedies for wrongful foreclosure. See Pet. App. A2-A5, C2.

In December of 1988, Gibraltar Savings was declared insolvent, and the Federal Savings and Loan Insurance Corporation (FSLIC) was appointed as receiver. Acting as receiver, FSLIC transferred substantially all of Gibraltar Savings' assets (including the promissory note involved here) to First Gibraltar Bank, but retained responsibility for the counterclaims and defenses raised by petitioners. FSLIC

promptly removed Gibraltar Savings' suit against petitioners to federal court. The Federal Deposit Insurance Corporation (FDIC) succeeded FSLIC as receiver when FSLIC was abolished in August of 1989. First Gibraltar then intervened to enforce its right to collect on the note. See Pet. App. A5-A6; 12 U.S.C. 1821a(a)(5) (Supp. IV 1992).

2. In January of 1991, the FDIC moved for summary judgment, arguing that petitioners' counterclaims were barred under 12 U.S.C. 1821(i)(2) (Supp. IV 1992), because the Federal Home Loan Bank Board (FHLBB) had determined that the receivership estate would not have sufficient assets to make payments to unsecured creditors. Although the FDIC served its motion on petitioner Sowell, it neglected to serve its motion on petitioners Ogg and Foxwood Management. When none of the parties objected to the summary judgment motion, the district court granted the motion in February of 1991; the court gave notice to all of the parties of its order. Although petitioners received that notice, they did not object at that time to the FDIC's failure to serve them. Instead, they "allowed the balance of the case pending before the district court to proceed for over a year without raising this lack of notice issue in the district court." Subsequently, First Gibraltar filed a motion for summary judgment on its claims, which the court granted in April of 1992. See Pet. App. A6-A7, A18, B1-B4 (summary judgment in favor of FDIC), C1-C5 (summary judgment in favor of First Gibraltar).

3. The court of appeals affirmed. Pet. App. A1-A31. The court rejected petitioners' argument that the district court committed reversible error in granting summary judgment notwithstanding the FDIC's

failure to give notice of the motion to all of the parties. *Id.* at A9-A18. The court first concluded that the district court "clearly erred" in granting summary judgment, because the failure to give notice violated Fed. R. Civ. P. 56(c). Pet. App. A11.

Stating that it should reverse unless the error was "plainly harmless" (Pet. App. A12), the court proceeded to consider that question. *Id.* at A12-A18. The court explained that "errors in notice are only harmless where the unnotified party has no meritorious legal claim or no legal claim that could be meritorious with development of the record." *Id.* at A12. The court then concluded that neither of petitioners' challenges to the district court's conclusion established a basis for overturning the district court's judgment. *Id.* at A13-A18. First, the court rejected the argument that "continuing change in the financial condition of Gibraltar Savings" might produce sufficient funds to allow petitioners to recover on their claims. *Id.* at A13-A17. The court explained that a claim against the FDIC as receiver is limited to "the amount that claimant would receive if the failed institution were liquidated and its claims paid according to the preference rules of the state in which the institution is located." *Id.* at A14-A15. Further, the amount of that liability is "fixed" on "the day that the FHLBB determines that an institution is insolvent," and "the FHLBB's determination of insolvency and the worthlessness of unsecured creditor claims is binding and cannot be collaterally attacked in claims against the FDIC." *Id.* at A15. Because the FHLBB had determined in 1988 that Gibraltar Savings was insolvent and would not have assets to pay "the claims of depositors or

secured creditors, let alone unsecured creditors," and because petitioners did not challenge the accuracy of that determination, any possible change in the financial condition of Gibraltar Savings would have no legal effect. *Id.* at A16-A17.

The court also rejected petitioners' contention that the failure of notice prejudiced them by depriving them of an opportunity to use their counterclaims to offset their liability to First Gibraltar. Pet. App. A17-A18. The court explained that "[t]he right of offset is inapplicable here because the FDIC does not hold [petitioners'] note against which the claims would be offset. Thus, [petitioners] have no right to offset their liability on the note held by First Gibraltar by counterclaims against the FDIC." *Ibid.* (citations omitted).

The court also rejected petitioners' challenges to the district court's grant of summary judgment in favor of First Gibraltar on its claim to collect the unpaid balance of the note. Pet. App. A18-A31.

ARGUMENT

Petitioners contend in their first two questions presented (Pet. 12-26)[1] that the court of appeals should have overturned the summary judgment the district court granted in favor of the FDIC. That contention is meritless.[2]

---

[1] The third and fourth questions presented (Pet. 26-45) challenge the grant of summary judgment to First Gibraltar. Because the FDIC has no direct interest in those questions, we do not address them in this brief.

[2] Those questions affect only Foxwood Management and Ogg, because Sowell was served with the motion in question. See Pet. App. A6.

1. Petitioners first argue (Pet. 12-16) that the proceedings below did not comport with procedural due process. That claim, however, was neither presented to nor decided by the court of appeals, and accordingly is not properly before this Court. *E.g.*, *Zobrest* v. *Catalina Foothills School District*, 113 S. Ct. 2462, 2466 (1993).

2. Petitioners also contend (Pet. 16-20) that the court of appeals erred in declining to reverse the judgment of the district court, because failure to give the notice of summary judgment required by Fed. R. Civ. P. 56(c) can never be harmless. Petitioners further argue that the Fifth Circuit's decision that such an error can be harmless conflicts with the decisions of other courts of appeals.

Those arguments are incorrect. Rule 56(c) of the Federal Rules of Civil Procedure provides that a "motion [for summary judgment] shall be served at least 10 days before the time fixed for the hearing." Although that Rule plainly was violated by the defective service in this case, such an error does not automatically require reversal of the district court's judgment. In light of the conclusion of the court of appeals that petitioners have neither a "meritorious legal claim," nor a "legal claim that could be meritorious with development of the record," Pet. App. A12, a remand to the district court to give petitioners ten days to build a record would be pointless. The rule of automatic reversal sought by petitioners is inconsistent with the spirit of "just, speedy, and inexpensive determination of every action" (Fed. R. Civ. P. 1) that animates the Federal Rules.

Nor does the decision of the court of appeals conflict with the decisions of other courts of appeals.

None of the decisions on which petitioner relies involve the kind of error at issue here, *i.e.*, failure of the movant to serve one of the nonmoving parties. Rather, they involve instances where a court granted summary judgment without waiting ten days after the motion was served,[3] or where a court granted summary judgment *sua sponte* without giving the losing party ten days' notice.[4] And even in those contexts, petitioner does not identify any court of appeals that has adopted a rule requiring automatic reversal. In fact, the courts have declined to adopt such a rule, both where the failure to wait ten days occurred in response to a party's motion,[5] or where

---

[3] See *Winbourne* v. *Eastern Air Lines, Inc.*, 632 F.2d 219, 223 (2d Cir. 1980).

[4] See *United States Development Corporation* v. *Peoples Federal Savings and Loan Association*, 873 F.2d 731, 735 (4th Cir. 1989); *National Expositions, Inc.* v. *Crowley Maritime Corporation*, 824 F.2d 131, 133 (1st Cir. 1987); *Yashon* v. *Gregory*, 737 F.2d 547, 551-552 (6th Cir. 1984), cert. denied, 486 U.S. 1032 (1988).

[5] At least four courts of appeals have accepted the propriety of harmless error analysis in cases where the district court responded to a properly served summary judgment motion without waiting ten days. *Melanson* v. *Caribou Reefers, Ltd.*, 667 F.2d 213, 214 (1st Cir. 1981) (affirming grant of summary judgment on less than ten days' notice where "noncompliance with rule 56(c) [w]as a procedural *damnum absque* any substantive *injuria*"); *Harrington* v. *Vandalia-Butler Board of Education*, 649 F.2d 434, 436 (6th Cir. 1981) ("[F]ailure to comply with the ten-day requirement of Rule 56(c) is subject to the harmless error rule."); *Ikerd* v. *Lapworth*, 435 F.2d 197, 203 (7th Cir. 1970) (summary judgment affirmed because appellant failed to show "specific * * * prejudice" resulting from the defect in notice); *Kelsey* v. *Minnesota*, 565 F.2d 503, 506 n.2 (8th Cir. 1977) (affirming grant of summary judgment

the court failed to provide adequate notice of its own intentions.[6] Thus, although there are some differ-

---

on less than ten days' notice as "harmless error"); see 10A Charles Alan Wright et al., *Federal Practice and Procedure* § 2719, at 10-11 (2d ed. 1983) ("[I]f the motion is served less than ten days before the hearing but no prejudice appears to have occurred, proceeding with the summary judgment motion still may be proper.").

There is some tension between those decisions and the Second Circuit's decision in *Winbourne* v. *Eastern Air Lines, Inc.*, 632 F.2d 219, 223-224 (1980), on which petitioners rely (Pet. 17). In *Winbourne* and *Gutwein* v. *Roche Laboratories*, 739 F.2d 93, 95 (1984), the Second Circuit expressed the view that a district court's grant of summary judgment without waiting ten days after the motion was filed could be harmless only in cases in which "the ten day notice is impractical, and it is absolutely clear that the non-moving party suffered no prejudice from a shortening of the period." *Gutwein*, 739 F.2d at 95. The situation at issue in those cases—in which the nonmoving parties interposed a contemporaneous objection to the action of the district court—is quite different from the situation here, where petitioners allowed the case to proceed for more than a year without raising the notice problem. Accordingly, those decisions do not offer a substantial indication as to how the Second Circuit would analyze a case like this one.

[6] At least six of the courts of appeals have accepted the propriety of harmless error analysis in cases where a district court grants summary judgment *sua sponte* without giving the parties ten days' notice. See, *e.g.*, *Davis Elliott International, Inc.* v. *Pan American Container Corp.*, 705 F.2d 705, 708 (3d Cir. 1983) (summary judgment entered *sua sponte* without ten days' notice subject to reversal only if "there is any state of facts on which the [nonmoving party] could conceivably recover"); *Powell* v. *United States*, 849 F.2d 1576, 1582 (5th Cir. 1988) (error is harmless if "the appellate court evaluates all of the nonmoving party's additional evidence and finds no genuine issue of material fact"); *Milwaukee Typographical*

ences of opinion in different courts of appeals regarding the circumstances in which notice errors can be harmless, there is no reason to accept petitioners' contention that other courts of appeals would have rendered a decision in this case different from that made by the court below.

Union No. 23 v. *Newspapers, Inc.*, 639 F.2d 386, 391 (7th Cir. 1981) ("[W]here no potential disputed material issue of fact exists, a summary judgment will not be disturbed even though the district court disregarded the procedure which should have been followed."); *Kaestel* v. *Lockhart*, 746 F.2d 1323, 1324 (8th Cir. 1984) ("noncompliance [with Rule 56(c)'s notice requirement] in limited circumstances may constitute harmless error"; affirming summary judgment after concluding that noncompliance was harmless); *Portsmouth Square, Inc.* v. *Shareholders Protective Committee*, 770 F.2d 866, 869 (9th Cir. 1985); *Capuano* v. *United States*, 955 F.2d 1427, 1432 (11th Cir. 1992) (*sua sponte* summary judgment without ten days' prior notice permissible if lack of notice "harmless").

None of the three *sua sponte* summary judgment cases on which petitioners rely (see note 4, *supra*) held that failure of the court to give ten days' notice would require reversal in all cases. The Fourth Circuit in *United States Development Corporation* noted that "extraordinary circumstances may justify departures from the ten-day notice requirement." 873 F.2d at 735 n.3. The First Circuit in *National Expositions, Inc.* affirmed the grant of summary judgment based on the appellant's failure to show any genuine issue of material fact. 824 F.2d at 133-135. Finally, the Sixth Circuit in *Yashon* reversed a *sua sponte* summary judgment that was granted at a time when counsel for the nonmoving party apparently had been advised by the district court that he need not file a brief regarding the substantive issues involved in the case until the district court ruled on certain pending discovery motions. 737 F.2d at 552-553. That procedural irregularity on the part of the district court does not resemble the situation involved here.

3. Finally, petitioners contend (Pet. 21-26) that the lack of notice was not harmless in this particular case. On that point, petitioners suggest only that if they had received notice they could have demonstrated that subsequent changes in the financial condition of Gibraltar Savings might have changed the solvency of the receivership estate. See Pet. 25-26. They do not, however, challenge the conclusion of the court of appeals that any such change would be irrelevant to their claims because the liability of the receiver is "fixed" based on the status of the estate on the date on which the FDIC is appointed. Pet. App. A15.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

DOUGLAS H. JONES
Acting General Counsel

JACK D. SMITH
Deputy General Counsel

ANN S. DUROSS
Assistant General Counsel

ROBERT D. MCGILLICUDDY
MICHELLE KOSSE
Counsel
Federal Deposit Insurance Corporation

MAY 1994